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ABSTRACT

Presented are the results of a study by and recommendations of the Virginia State Crime Commission to develop a program of appropriate education for jail inmates with disabilities. Four public hearings resulted in seven findings, including the following: federal law requires the states to provide special education to handicapped inmates; Virginia's plan would be the second such in the United States; the approximate annual cost per inmate would be $6,750; special education for jail inmates should be 100% state funded. Seven recommendations are made, inclduing the following: an individuals' handicapping condition could be ascertained during routine pre-sentence investigations; an inmate identified as handicapped would be notified of his right to receive special education and would execute a written request for, or waiver of, services; local inmates would receive services either on-site or in the local school system; the Virginia Department of Education would be responsible for appropriate expenditures and for coordinating and ensuring the efficient conduct of the proposed program. The report provides information in separate chapters on the problem background, the study design, the problem summary, issues identified, problem analysis/discussion, findings, and recommendations. Six appendixes cover legislative and judicial authority, cost estimates, and proposed legislation. (DB)

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REPORT OF THE VIRGINIA STATE CRIME COMMISSION

Education of Handicapped Jail Inmates

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 16

COMMONWEALTH OF VIRGINIA
RICHMOND
1990

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George F. Ricketts, Sr.

Attorney General's Office:

H. Lane Kneedler

COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

General Assembly Building

910 Capitol Street

POST OFFICE BOX 3-AG
RICHMOND, VIRGINIA 23208

IN RESPONSE TO
THIS LETTER TELEPHONE
(804) 225-4534

ROBERT E. COLVIN
EXECUTIVE DIRECTOR

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ATTORNEY GENERAL'S OFFICE
H. LANE KNEEDLER

October 17, 1989

TO: The Honorable Gerald L. Baliles, Governor of Virginia
and Members of the General Assembly

House Joint Resolution 283, agreed to by the 1989 General Assembly, directed the Virginia State Crime Commission to determine "(i) the number of handicapped youth requiring services, (ii) the resources required to provide services, (iii) the most efficient method of service delivery, and (iv) the cost of providing such services."

In fulfilling this directive, a study was conducted by the Virginia State Crime Commission. I have the honor of submitting herewith the study report and recommendations on education of handicapped jail inmates.

Respectfully submitted,

Elmon T. Gray

ETG/sm

Treatment Issues Subcommittee Studying

EDUCATION OF HANDICAPPED JAIL INMATES (HJR 283)

Members

Delegate Clifton A. Woodrum, Chairman
Delegate Robert B. Ball, Sr.
Delegate V. Thomas Forehand, Jr.
Delegate Raymond R. Guest, Jr.
Mr. Robert F. Horan
Mr. H. Lane Kneedler
Reverend George F. Ricketts, Sr.
Delegate Warren G. Stambaugh

Staff

Robert E. Colvin, Executive Director
D. Robie Ingram, Staff Attorney
Michael P. Maddox, Research Assistant
Sylvia A. Coggins, Administrative Assistant

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I. AUTHORITY FOR STUDY

House Joint Resolution 283, sponsored by Delegate Warren G. Stambaugh and passed by the 1989 General Assembly, authorized the Virginia State Crime Commission to "conduct a study of handicapped individuals under the age of twenty-two years in Virginia jails to determine (i) the number of handicapped youth requiring services, (ii) the resources required to provide services, (iii) the most efficient method of service delivery, and (iv) the cost of providing such services." (See Appendix A.)

§9-125 of the Code of Virginia establishes and directs the Virginia State Crime Commission (VSCC) "to study, report, and make recommendations on all areas of public safety and protection." §9-127 of the Code of Virginia provides that "the Commission shall have duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in §9-125, and to formulate its recommendations to the Governor and the General Assembly." §9-134 of the Code of Virginia authorizes the Commission to "conduct private and public hearings, and to designate a member of the Commission to preside over such hearings." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of education of handicapped inmates as requested by House Joint Resolution 283.

II. MEMBERS APPOINTED TO SERVE

During the April 18, 1989 meeting of the Crime Commission, its Chairman, Senator Elmon T. Gray of Sussex, selected Delegate Clifton A. Woodrum, to serve as the chairman of the treatment issues subcommittee which was asked to conduct this study. Members of the Crime Commission who served on the subcommittee were:

Delegate Clifton A. Woodrum, of Roanoke, Chairman

Delegate Robert B. Ball, Sr., of Henrico

Delegate V. Thomas Forehand, Jr., of Chesapeake

Delegate Raymond R. Guest, Jr., of Front Royal

Mr. Robert F. Horan, Jr., of Fairfax County

Mr. H. Lane Kneedler, Attorney General's Office

Rev. George F. Ricketts, Sr., of Richmond

Delegate Warren G. Stambaugh, of Arlington

III. EXECUTIVE SUMMARY

The full Crime Commission met on October 17, 1989, and received the report of the subcommittee. After careful consideration, the findings and recommendations of the subcommittee were adopted by the Commission.

This study, authorized by HJR 283, sponsored by Delegate Warren G. Stambaugh, was undertaken to respond to a request from the U.S. Department of Education Office for Civil Rights (OCR) that Virginia develop a plan for education of its handicapped jail inmates. At the time of the request, only one other state (Massachusetts) had such a program in development and none had been implemented.

The study was, thus, undertaken with a dearth of background material, a clear objective, and an unclear path to completion complicated by the sheer number of jails (95) having vastly different available facilities.

The subcommittee met on four occasions to receive input and public testimony from the Department of Education, the Department of Correctional Education, the Department of Corrections, the Department for Rights of the Disabled, and many other interested parties. On each occasion the subcommittee received a report from the Commission staff on the status of its work. Many manhours were spent by all concerned parties in development of the proposed program due to the very complex nature of the merger of correctional programs and philosophy with educational programs and philosophy.

After intensive review of the many issues involved, the subcommittee made the following findings:

- *That P.L. 94-142 (20 U.S.C. §1400 et seq.), as interpreted by Green v. Johnson and OCR, require the states to provide special education to handicapped jail inmates;*
- *That Virginia's plan, if implemented, would be the second such plan extant in the U.S.;*
- *That prediction of a reliable number of inmates expected to utilize special education services is extremely difficult because of limited available data; that best estimates suggest between 50 and 100 individuals in each category (state-responsible jail inmates and local jail inmates) would utilize such services;*
- *That the approximate annual cost per inmate would be $6,750.*
- *That, in almost all cases, Virginia's jails are not equipped with on-site facilities and resources to provide special education services;*
- *That, despite limitations on available resources, special education would be more effectively and efficiently provided locally, rather than centrally or regionally; and*
- *That, to avoid disproportionate burdens on local schools and jails, special education for jail inmates should be 100% state funded.*

In accordance with the above findings the subcommittee made the following recommendations:

- *An individual's handicapping condition, if any, could be ascertained during routine pre-sentence investigations conducted by probation and parole officers;*

- *Upon discovery of a handicap or an Individual Education Plan, the individual, if not then incarcerated, would be referred to the local school board for services, if desired by the individual;*

- *Upon his sentencing to incarceration, an inmate identified as handicapped would be notified by the jail administrator in writing of his right to receive special education and would execute a written request for, or waiver of, services;*

- *If a state-responsible felon, he would be assigned highest priority for transfer to Corrections for receipt of special education services, transfer subordinate only to those with significant health problems or those who present a threat to the safety of other inmates and staff.*

- *If a local inmate he would either (i) receive services on-site in accordance with a "local plan" developed by the local jail administrator and the local division school superintendent, or (ii) receive services in the local school system via "educational release." Such release would again require the consultation and agreement between the local jail administrator and the division school superintendent.*

- *All funding would be provided by the Commonwealth for implementation of either of the above local plans, responsibility for appropriate expenditure to reside with the Virginia Department of Education.*

- *This recommended procedure would require the Department of Education to be the agency responsible for coordinating and ensuring the efficient conduct of the proposed program and require the local educational agencies to implement the program in concert and close cooperation with the local jail administrators, require the Department of Correctional Education to provide the requisite technical assistance to the jails and educators, ensure the continuing cooperation among jail administrators in "swapping" inmates in those cases where service requirements are not matched by resources, and require jail administrators to implement the notification system.*

IV. BACKGROUND

A. Legal Background

Federal law, 20 U.S.C.S. 1400 et seq. and state law, Code of Virginia §22.1-214 (See Appendix B.) require a free, appropriate education be provided to all handicapped children. (See Appendix C.) Johnson v. Green, 513 F. Supp. 965 (D. Mass, 1981) establishes the proposition that those individuals otherwise entitled to such education do not lose this entitlement by virtue of incarceration.

B. Impetus of Study

In April, 1987, the U. S. Department of Education's Office for Civil Rights (OCR) approached the Virginia Department of Correctional Education regarding a complaint filed by a jail inmate alleging a failure to provide him special education, as required by law, while he was incarcerated in the Richmond City Jail. (See Appendix C.) Subsequently, the federal agency contacted the Virginia Department of Education, and has been in regular contact with the state education agency since, regarding development and implementation of an effective plan for the evaluation and education of handicapped youth in the state's jails (See section VI of this report for applicable definition of handicapped child.) Because a program exists already in the state's prisons for special education of youth in need of such education, the focus of concern is limited to the 95 jails in the Commonwealth.

The Virginia Department of Education, in an attempt to ascertain the scope of the problem and alternative approaches to its resolution, conducted a survey of other states' existing programs for providing special education in jails. The conclusion of this study was that no state then possessed a comprehensive program for identification and education of handicapped youth in their jails, the only possible exception being the District of Columbia, which operates a single institution for jailed inmates (and may therefore approach the problem as states do in their prison systems). The Office for Civil Rights apparently also concluded that no such program then existed in the fifty states and requested the Commonwealth to develop something in the nature of a model plan.

Since that study the subcommittee has learned that the State of Massachusetts has implemented a program to provide special education to jail inmates housed in its 14 Houses of Correction (jails). A portion of Massachusetts' program (notification of availability of special education) has been incorporated into the subcommittee's recommended program.

V. STUDY DESIGN

The subcommittee reviewed the law related to education of handicapped children, and has met with representatives from the Department of Education, Department of Correctional Education and the Department for Rights of the Disabled. Various other experts on the law, and existing

educational practices, were contacted in order to determine the scope of the problem and the most efficient manner in which it may be addressed.

An extensive data bank was acquired and researched to develop the recommendations set forth herein. Extensive input from the above agencies and the Office of the Attorney General, the Virginia Sheriffs' Association, and educators in many disciplines was required and received by the subcommittee via testimony and written responses during its meetings.

Meetings:

First subcommittee meeting	June 19, 1989
Second subcommittee meeting	July 17, 1989
Third subcommittee meeting	August 14, 1989
Fourth subcommittee meeting	September 18, 1989

Reports:

Initial staff study	June 19, 1989
First update	July 17, 1989
Second update	August 14, 1989
Update & proposed recommendations	September 18, 1989
Final subcommittee report to Commission	October 17, 1989

VI. PROBLEM SUMMARY

A. Special Education Needs in Jails are Unknown and Difficult to Predict. The transient population of the state's jails makes it difficult to determine the exact levels of need for special education among inmates. That a great number of inmates are entitled to special education (probably substantially more per capita than the population as a whole) has been fairly well established (refer to the Final Report prepared by Dr. Ingo Keilitz of the Institute on Mental Disability and the Law, The Prevalence of Mental Disabilities and Handicapping Conditions Among Juvenile Offenders, June 1987). Dr. Keilitz suggests the prevalence of handicapping conditions to be 35.6% for learning disabilities and 12.6% for mental retardation. This contrasts with an estimated 10% for such handicaps among the general population. Before a program can be developed and implemented the magnitude of the problem must be more firmly established.

B. Jail Residence Time is Too Short to Complete Special Education Service On-Site. Because a jail, unlike a prison, is primarily for short-term confinement, the environment does not permit extended administrative processes directed at specific individuals. The time and money ordinarily required to identify and evaluate a handicap and to provide the required special education makes development of an efficient and effective mechanism for delivery of special education services to jail inmates extremely difficult. Virginia special education guidelines, as set forth in state regulations, allow a total of 110 days to complete special education evaluation. A 1988 report of the Department of Correctional Education concluded that the average local jail

inmate stay is, likewise, 110 days (275 days for state-responsible inmates.)[1]

C. Special Education Facilities Are Not On-Site at Most Jails. Because jails are frequently small units, sometimes dealing with only a very few individuals, the efficacy of placing at each jail the substantial human and physical resources necessary for identification, evaluation and special education of handicapped inmates is questionable.

VII. ISSUES IDENTIFIED

On the basis of the problems identified above, the subcommittee identified the following as issues of specific concern for this study:

A. How many inmates are presently entitled to special education by virtue of an existing handicap condition, and what is the cost of providing such education?

B. Need jails provide special education services for short-term inmates and, if so, what is the minimum term for which services should be provided?

C. What means should be used to determine the existence of a handicap requiring special education?

   (i) Subsequent to incarceration, should testing or notification occur?

   (ii) What agency or entity should be responsible for testing or notification?

   (iii) Where should testing of inmates be conducted (i.e., in a central or regional facility, in local facilities, or within the jail itself)?

D. What agency or entity (or combination thereof) should have the responsibility to identify, evaluate and educate inmates entitled to special education under the law?

   (i) Is there need for creation of a new entity?

   (ii) If not, which existing body is most qualified and can most efficiently provide necessary services?

E. How should the cost of providing special education to handicapped inmates be apportioned?

F. At what facility should the education be provided (Individual jails? Schools? Central location?)

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[1] Department of Correctional Education Report on Educational Programs in Virginia Jails ("Dutton Report"), January, 1988.

VIII. PROBLEM ANALYSIS/DISCUSSION

A handicapped child is defined by P.L. 94-142 (20 U.S.C. §1401) as any individual between the ages of three and twenty-one who is "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." Specific learning disabilities are inclusive of any "disorder in one or more of the basic psychological processes involved in understanding or in using language." The Code of Virginia §22.1-213 offers a similar definition, but includes any person between ages two and twenty-one, and allows also for those "otherwise handicapped as defined by the Board of Education."

It is difficult to establish "average" cost for assessment and education because of the diversity of those conditions qualifying a person as handicapped, and entitling him to special education. (See Section IX(C) of this report.) This problem would be compounded in the jails by (i) lack of qualified assessment or teaching staff, and (ii) the short typical stay of many inmates. (The testing period would frequently extend beyond the time of incarceration.)

Because the time for identification and assessment of a handicap extends to as long as 110 days, as permitted under P.L. 94-142, (20 U.S.C. 1400, et seq.), an inmate may never see completion of his individualized education program while in jail, depending upon the nature of the handicap.

Additionally, the obligation of the public school system to identify and address handicaps suggests that many persons entitled to special education will already have undergone testing prior to incarceration. This brings to fore the question whether a minimum period of incarceration is necessary before committing to provide services.

If an inmate already receives special education services in the community, and is serving only a short term in jail (perhaps as little as a few hours), it may be inefficient and inappropriate to begin development of a new program.

Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981) interpreted P.L. 94-142 as requiring special education for all those entitled, despite incarcerated status. Thus, all such handicapped persons must be provided some program. The Virginia Department of Rights for the Disabled has emphasized the need to insure that no individual entitled to special education is denied.

Identification and assessment of handicapped persons in state prisons is much easier because it is done initially through a single facility. The short time of confinement in jails, and scattered geography, would make a similar process for jail inmates significantly more difficult (or even impossible, depending on who would qualify for testing). Creation of regional facilities or a single facility might respond to this problem in a limited fashion, but would not be feasible for very short-term inmates.

Local facilities could be utilized, and already exist in the form of local educational agencies. But security concerns make use of community education

facilities difficult. Alternatively, resources and personnel from local educational agencies could be brought into jails to provide necessary services. To maintain a sufficient number of staff in each jail would entail excessive expense and would, in most cases, result in under-used resources.

Under Code of Virginia §22.1-214 the Board of Education is charged with preparation and supervision of a plan for school divisions. Code of Virginia §22.1-7 provides that "each state board, state agency and state institution having children in residence or in custody shall have responsibility for providing for the education and training to such children."

20 U.S.C. §1412 places ultimate responsibility for assuring that programs will be carried out with the state educational agency. This section explicitly allows, however, for participation of other agencies within the state.

The structure of special education programs in jails must, based on the above, be best considered in terms of what is the most reasonable and responsible method. Wherever the duties are placed, consideration of funding for such agency (or agencies) is an important aspect, and should be developed as an integral part of such plan.

IX. FINDINGS

A. P.L. 94-142 as Interpreted by Green v. Johnson and OCR, Requires the States to Provide Special Education in Jails.

P.L. 94-142 guarantees a free, appropriate public education be provided every handicapped individual ages three through 21 years. The federal district court in Massachusetts held that this guarantee applies equally to incarcerated individuals, whether (imprisoned or) jailed or free. Green v. Johnson, supra. The Office of Civil Rights (OCR), pursuant to that ruling and a complaint filed against the Richmond City Jail regarding the same subject (See Jail Inmate complaint; Appendix D.), found Virginia in non-compliance and requested Virginia develop a plan for providing said education.

B. Only One State Currently Provides Special Education to Jail Inmates.

During the course of the Crime Commission Study, the subcommittee learned that Massachusetts, following Green v. Johnson, developed a program to provide special education in jails. Inasmuch as Massachusetts has only 14 jails with education facilities already in place on site, no real parallel exists between Virginia and Massachusetts. Massachusetts was not, thus, a valuable model. (It is noteworthy that Virginia's plan would be only the second in the country.)

C. There Is No Reliable Predictor of the Number of Jail Inmates Requiring Special Education.

Four models were developed to attempt a prediction of the number of inmates who would be eligible for or utilize special education services.

Available data suggest that the number of locally-responsible and state-responsible inmates would be roughly equivalent. Depending upon the model used, the predicted range could be from approximately 47 to 228 annually in each category. (See Figure IX-1 and Appendix E for explanation.) A reasonable conclusion may be based on available data that a range of 50 to 100 inmates locally (and a like number of state-responsible inmates) would utilize special education services. The accompanying caveat is that the range is the result of "soft" data manipulation/extrapolation and cannot be considered definitive.

Likewise, the annual cost of approximately $6750.00 per inmate is, first, only a rough cost of yearly services including assessment and, second, does not account for the independent cost of assessment when an individual is found not handicapped and, thus, ineligible for special education.

D. Most Jails Are Not Equipped to Provide On-Site Special Education.

While certain jails in Virginia do provide some educational services on-site (e.g. GED), only one is reported to provide any semblance of special education, according to the Department of Corrections "Dutton Report" (See Footnote 1, page 6.) Jails in Virginia have traditionally been conceived as places of temporary incarceration rather than institutions for providing remedial education.

E. Special Education Services Should Be Provided Locally Rather Than Centrally or Regionally.

Some Virginia communities have the wherewithal and population base to support a jail facility with on-site educational services. The subcommittee concluded that, in those cases where it is feasible, such communities should devise a local plan to provide on-site special education based upon the cooperation of the local jail administrators and school superintendent.

The subcommittee found both central and regional facilities infeasible in that: (1) the local option would be denied, (2) the population to be served is virtually unknown and any facility so dedicated could be either immediately overrun or entirely unused, and (3) such dedication would entail a delay in service delivery inasmuch as Virginia's corrections system is already overpopulated.

F. Education Services in Virginia's Jails Should Be Funded by the Commonwealth.

P.L. 94-142 apparently requires (1) that the state educational authority ensure that special education services are provided, and (2) that the local education authority be the implementing agency.

The subcommittee deemed the potential additional resource requirement created by compliance with P.L. 94-142 to be potentially unfair and unduly burdensome to the localities and that to ensure a fair distribution of expenditures, the Commonwealth should itself bear the full financial burden. Otherwise, a citizen of one county who finds himself jailed in another county could tax the community to which he has no ties whatsoever for the cost of his special education.

IMPACT ESTIMATION
HANDICAPPED INMATES
IN VIRGINIA'S JAILS
POTENTIALLY RECEIVING SPECIAL EDUCATION
UNDER P.L. 94-142

RANGE ESTIMATION

	MINIMUM[1]	LOW[3]	HIGH[2]	MAXIMUM[4]
State Felons	47 ($317,250)	60 ($405,000)	89 ($600,750)	223 ($1,505,250)
Local Inmates	46 ($310,500)	60 ($405,000)	91 ($614,250)	228 ($1,539,000)

METHOD

1. *Massachusetts empirical/1.6% of total inmates in handicapped education*
2. *Ingo Keilitz/20% of inmates under 22 handicapped and DCE 70% opt-in rate*
3. *DCE 1988 survey/9.5% under 22 with handicap (opt-in rate not calculated)*
4. *Ingo Keilitz/50% of inmates under 22 handicapped and DCE 70% opt-in rate*

(Detailed calculations in Appendix F.)

NOTE: In 1988, out of 12,107 inmates (the average daily prison population), DCE data showed 106 corrections inmates under 22 were eligible and evaluated for special education. (32 opted out.)

Figure IX - 1

X. RECOMMENDATIONS OF THE SUBCOMMITTEE

Introduction

The full Crime Commission met on October 17, 1989, and received the report of the subcommittee. After careful consideration, the findings and recommendations of the subcommittee were adopted by the Commission. The following recommendations were offered by the subcommittee to address the educational needs of handicapped jail inmates in accordance with 20 U.S.C. §1400 et seq. (P.L. 94-142). The recommended program is comprised of these major components:

- Identification/notification of handicapped persons in the eligible group.
- Provision of appropriate services to state-responsible inmates identified as handicapped.
- Provision of appropriate services to inmates sentenced to jail, or not eligible for transfer to state institution.

A single recommendation is offered for education of state-responsible inmates because the singular recommendation appears to be a highly effective means for addressing that group, utilizes resources already in place, and places the responsibility for services on the already-responsible party.

Education of inmates sentenced to jail, and those remaining in jail, appears, per P.L. 94-142, to be the responsibility of local educational agencies. Accordingly, both recommendations are offered to that end, providing for local responsibility and autonomy. Due to the extraordinary nature of this obligation, it is proposed that any additional financial burden be assumed by the state educational agency and funded by the Commonwealth.

Identification/Notification

Recommendation 1: Identify Inmates (as Handicapped) during Pre-Sentence Investigation.

The subcommittee recommended that probation and parole officers, while routinely conducting an examination of an individual's educational background during pre-sentence investigations, check for any information related to the individual's educational background which indicates the existence of an Individual Education Plan (IEP) or information which otherwise indicates a handicap. Upon such a finding, the individual, if not incarcerated, would be referred to the local school system for special education services and, if incarcerated, his handicapped status would be reported to the jail administrator.

Recommendation 2: Notify All Identified Inmates of Right to Special Education.

The subcommittee recommended that jail administrators advise each inmate sentenced to incarceration and identified as handicapped that he has the right to special education. The jail administrator would obtain from each such inmate a signed request for such services or a signed waiver of right.

The above identification, referral, and notification of rights would apply only to those individuals younger than 22, and without a high school diploma or equivalent.

Provision of Services

Recommendation 3: Provide Special Education Services at Sentencing.

The subcommittee recommended that special education requirements be addressed no earlier than sentencing. An inmate's continuous residence in jail prior to sentencing is so tenuous as to render ineffective any attempt to provide special education services.

Recommendation 4: Establish a Priority System to Speed Transfer of State Responsible Inmates to Corrections.

Recognizing that many jail inmates are sentenced to prison but are awaiting transfer to prison, the subcommittee recommended that those identified as handicapped and requesting special education service be assigned a higher priority for transfer, that the Department of Corrections develop such a priority transfer system, and that such inmates' priority be subordinate only to the transfer of violent or seriously ill inmates.

The subcommittee made such recommendation to speed the delivery of services which are already available in the corrections system.

Recommendation 5: Establish a Local option for Delivery of Services to Local Jail Inmates.

The subcommittee recommended two methods for delivery of services to local jail inmates identified as handicapped and who request special education.

First, the subcommittee recommended that the special education services be provided in the jail where the jail is equipped with facilities and where the division superintendent of schools and the jail administrator are able to devise an on-site "local plan" which merges the facility resource with the school system's personnel resource.

Second, in cases where such on-site "local plan" is infeasible, the subcommittee recommended an amendment to Virginia Code §53.1-131 to provide for educational release of any qualifying inmate. Such release would be to the local school facilities after consultation and agreement between the local jail administrator and the division superintendent of schools.

Thus, the proposed options allow for special education either in the jail in cases where the jail has an adequate facility, or release to the community's educational facility in cases where the local jail is ill-equipped to provide the services on-site and the inmate could safely be assigned to education release. In both cases, consultation and agreement between the jail administrator and the division superintendent would be prerequisite.

Funding and Administration

Recommendation 6: Provide for 100% State Funding of Special Education for Handicapped Jail Inmates.

The subcommittee recommended that Virginia Code §2.1-701 be amended to provide that the educational alternatives recommended in Recommendation 5 be fully state funded, thus adding no financial burden to the local jails or school systems. The subcommittee recognizes that local educational agencies are responsible for providing service, and that the state educational agency is responsible for ensuring services are provided. (See Appendix F for proposed amendment.)

The subcommittee sought via this recommendation to avoid any bookkeeping tangle and to protect the local school systems from an inordinate, unexpected and virtually unpredictable increase in local education costs which it may incur in providing services to, among others, those individuals who have no tie to the community other than the misfortune of incarceration there.

Recommendation 7: Provide for Program Concurrence with Existing Placement Guidelines.

The subcommittee recommended an amendment to Virginia Code §22.1-215 to provide that the above-described plan for special education of jail inmates comport with existing placement guidelines. (See Appendix F for proposed amendment.)

Recommendation 8: Establish Responsibilities Among Affected Agencies.

The subcommittee recommended apportioning responsibility for the implementation of its proposed program as follows:

The Department of Education: The Department of Education would develop cost projections for providing special education services locally by compiling data from local school systems within its purview and population projections compiled by the subcommittee. The Department of Education would take the lead in development of a funding mechanism to accommodate the elements of the proposed program and provide for 100% funding by the Commonwealth which funds would be then funneled through the Department as the agency responsible for ensuring the education of handicapped jail inmates.

The Department of Corrections: The Department of Corrections would develop a priority transfer system to assure highest priority for transfer of state responsible jail inmates to corrections when such inmates are eligible for and desire special education. This priority would be subordinate only to those who present a threat to the safety of other inmates and staff, or those who are ill.

The Department of Corrections would also be responsible for ensuring that probation and parole officers take note of any indication of a qualifying handicap during the routine examination of an offender's educational background as part of the pre-sentence investigation and

that such officers properly refer inmates who are identified as handicapped.

The Department of Correctional Education: The Department of Correctional Education (DCE) would continue its role as technical assistant to jails in the education of local inmates. DCE would also develop the notification of rights form and provide guidance and technical assistance to local jails in implementing the notification system. The subcommittee anticipated some minor expansion of the role due to the expansion of inmate education to the local school systems through education release.

Local School Divisions: The local school divisions would occupy the role of service providers in accordance with P.L. 94-142. Incumbent upon them also will be the development of a local plan for on-site education in cases where such is possible.

Local Sheriffs and Jail Administrators: Local jailors would bear the responsibility of written notification of identified inmates of their right to receive special education and of maintenance of the record of the inmate's acceptance or waiver of such service. Additionally, local jailors would cooperate with the local school division in the development of a "local plan" where available. Finally, the subcommittee stressed the importance of continuing the existing policy of inmate "swapping" where one jail has inmate services available for an inmate incarcerated in another locality where such services are not available. Such a program would be especially valuable to accomodate special education needs.

XI. RESOURCES/ACKNOWLEDGEMENTS

The Commission greatly appreciates the assistance of the following in the conduct of this study:

Virginia Department of Education
Dr. Rondle Edwards
Ms. Nancy Haynes
Mr. William Elsesser

Virginia Department of Correctional Education
Dr. Osa Coffey
Ms. Helen C. Williams
Mr. Robert L. Slaughter

Virginia Department of Corrections
Mr. Michael Leininger

Virginia Department for Rights of the Disabled
Ms. Sandra Reen

National Center for State Courts
Dr. Ingo Keilitz

Governor's Employment & Training Department
Dr. Charles Price

Attorney General's Office
William Muse, Esq.

Division of Legislative Services
Ms. Norma Szakal, Esq.
Ms. Brenda Edwards

Massachusetts Department of Corrections

Elk Hill Farms
Mr. Richard Munchel

APPENDIX A

1989 SESSION

LD9079325

HOUSE JOINT RESOLUTION NO. 283

Offered January 18, 1989

Directing the Virginia State Crime Commission to conduct a study of handicapped individuals in Virginia jails.

Patrons–Stambaugh, Guest, Ball, Woodrum, Almand, Forehand and Dicks; Senator: Gray

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Referred to the Committee on Rules

WHEREAS, Public Law 94-142, the Education of the Handicapped Children Act (20 U.S.C. §§ 1400-1485), assures that all handicapped youth from birth through age twenty-one have available to them a free, appropriate public education which emphasizes special education and related services designed to meet their unique needs; and

WHEREAS, the jail population of such youth may approach 1,000 inmates; and

WHEREAS, the Virginia Department of Education, as the State Educational Agency, appears to be charged under Section 1412 of P.L. 94-142 to assure the provision of special education and related services to all handicapped youth in the Commonwealth; and

WHEREAS, the Virginia Department of Education has not determined how special education and related services might be provided to jailed handicapped offenders; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission is requested to conduct a study of handicapped individuals under the age of twenty-two years in Virginia jails to determine (i) the number of handicapped youth requiring services, (ii) the resources required to provide services, (iii) the most efficient method of service delivery, and (iv) the cost of providing such services.

The Commission shall employ whatever methods of inquiry it may deem necessary, including, but not limited to the employment of additional temporary staff and the conducting of public hearings across the Commonwealth. The Department of Education, the Department of Correctional Education and the Department of Criminal Justice Services shall provide their expertise and resources, as may be requested, to the Commission in staffing this study.

The direct costs of this study are estimated to be $5,500, and such amount shall be allocated to the Virginia State Crime Commission from the general appropriation to the General Assembly. The Commission shall complete its study and make its recommendations, if any, no later than December 1, 1989, as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

Official Use By Clerks	
Agreed to By The House of Delegates	**Agreed to By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

APPENDIX B

ARTICLE 2.

Special Education.

§ 22.1-213. Definitions. — As used in this article:

1. *"Handicapped children"* means those persons (i) who are aged two to twenty-one, inclusive, having reached the age of two by the date specified in § 22.1-254, (ii) who are mentally retarded, physically handicapped, seriously emotionally disturbed, speech impaired, hearing impaired, visually impaired, multiple handicapped, other health impaired including autistic or who have a specific learning disability or who are otherwise handicapped as defined by the Board of Education and (iii) who because of such impairments need special education.

2. *"Special education"* means classroom, home, hospital, institutional or other instruction, including physical education and vocational education, to meet the reasonable educational needs of handicapped children, transportation, and related services required or appropriate to assist handicapped children in taking advantage of, or responding to, educational programs and opportunities commensurate with their abilities. The Board of Education shall determine by regulation standards for determining which instruction and services must be provided pursuant to an individualized education program.

3. *"Specific learning disability"* means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term does not include children who have learning problems which are primarily the result of visual, hearing or motor handicaps, of mental retardation, or of environmental, cultural or economic disadvantage. (Code 1950, § 22-10.3; 1974, c. 480; 1978, c. 386; 1980, c. 559; 1983, c. 538.)

§ 22.1-214. Board to prepare special education program for handicapped children. — A. The Board of Education shall prepare and supervise the implementation by each school division of a program of special education designed to educate and train handicapped children between the ages defined in § 22.1-213 and may prepare and place in operation such program for such individuals of other ages. The program developed by the Board of Education shall be designed to ensure that all handicapped children have available to them a free and appropriate education, including special education designed to meet the reasonable educational needs of such children. The program shall require (i) that the hearing of each handicapped child be tested prior to placement in a special education program and (ii) that a complete audiological assessment, including tests which will assess inner and middle ear functioning, be performed on each child who is hearing impaired or who fails the test required in (i) hereof. The school boards of the several school divisions, the Department of the Visually Handicapped, the Department for the Deaf and Hard-of-Hearing, Department of Health and other state and local agencies which can or may be able to assist in providing educational and related services shall assist and cooperate with the Board of Education in the development of such program.

B. The Board of Education shall prescribe procedures to afford due process to handicapped children and their parents or guardians and to school divisions in resolving disputes as to program placements, individualized education programs, tuition eligibility and other matters as defined in state or federal statutes or regulations.

C. The Board of Education may provide for final decisions to be made by a hearing officer. The parents and the school division shall have the right to be represented by legal counsel or other representative before such hearing officer without being in violation of the provisions of § 54-44 of the Code of Virginia.

§ 22.1-214.3. Department to develop certain curriculum guidelines; Board to approve. — The Department of Education shall develop curricula for the school-age residents of the state training centers for the mentally retarded and curriculum guidelines for the school-age residents of the state mental health facilities in cooperation with the Department of Mental Health and Mental Retardation and representatives of the teachers employed to provide instruction to the children. Prior to implementation, the Board of Education shall approve these curricula and curriculum guidelines.

These curricula and curriculum guidelines shall be designed to provide a range of programs and suggested program sequences for different functioning levels and handicaps and shall be reviewed and revised at least every three years. In addition to academic programming, the curriculum guidelines for the school-age residents of the state mental health facilities shall include affective education and physical education as well as independent living and vocational education with particular emphasis on the needs of older adolescents and young adults. (1985, c. 350.)

The number of this section was assigned by the Virginia Code Commission, the number in the 1985 act having been 22.1-214.2.

Editor's note. — Acts 1985, c. 350, cl. 2, provides that the first set of curricula and curriculum guidelines shall be completed by December 1, 1985, and that a report on these materials shall be submitted to the 1986 Session of the General Assembly.

§ 22.1-215. School divisions to provide special education; plan to be submitted to Board. — Each school division shall provide free and appropriate education, including special education, for the handicapped children residing within its jurisdiction in accordance with regulations of the Board of Education.

For the purposes of this section, "handicapped children residing within its jurisdiction" shall include: (i) those individuals of school age identified as appropriate to be placed in public school programs, who are residing in a state institution operated by the Department of Mental Health and Mental Retardation located within the school division, or (ii) those individuals of school age who are placed and living in a foster care home or child-caring institution or group home located within the school division and licensed under the provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of this Code as result of being in the custody of a local department of social services or welfare or being privately placed, not solely for school purposes.

The Board of Education shall promulgate regulations to identify those children placed within facilities operated by the Department of Mental Health and Mental Retardation who are eligible to be appropriately placed in public school programs.

The cost of the education provided to children residing in the state institutions, who are appropriate to place within the public schools, shall remain the responsibility of the Department of Mental Health and Mental Retardation.

Each school division shall submit annually to the Board of Education by such date as the Board shall specify a plan acceptable to the Board for such education for the year following and a report indicating the extent to which the plan required by law for the preceding year has been implemented. (Code 1950, § 22-10.5; 1974, c. 480; 1978, c. 386; 1980, c. 559; 1985, c. 158.)

§ 22.1-216. Use of public or private facilities and personnel under contract for special education. — A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or any other public or private nonsectarian school, agency or institution approved by the Board of Education. (Code 1950, § 22-10.6; 1974, c. 480; 1980, c. 559.)

B. A school board may, in lieu of providing transportation on an approved school bus, allot funds to pay the reasonable cost of special arrangement transportation. The Board of Education shall reimburse the school board sixty percent of such cost if funds therefor are available.

C. Costs for operating approved school buses while used exclusively for transporting handicapped children shall be reimbursed according to the regulations promulgated by the Board of Education from such state funds as are appropriated for this purpose. (Code 1950, § 22-10.11; 1974, c. 480; 1975, cc. 464, 513; 1978, c. 386; 1980, c. 559; 1983, c. 521.)

§ 22.1-217. Visually impaired children. — A. Special education for visually impaired children provided by a school division shall be established, maintained and operated jointly by the school board and the Virginia Board for the Visually Handicapped subject to the regulations of the Board of Education.

B. The Virginia Board for the Visually Handicapped shall prepare and place in operation a program of special education services in addition to the special education provided in the public school system designed to meet the educational needs of visually impaired children between the ages of birth and twenty-one and may prepare and place in operation such programs for such individuals of other ages. In the development of such a program, the Virginia Board for the Visually Handicapped shall cooperate with the Board of Education and the school boards of the several school divisions.

C. As used in this section:

1. *"Visually impaired"* shall be defined by the Board of Education and the Virginia Board for the Visually Handicapped.

2. *"Program"* means a modified program which provides special materials or services and may include the employment of itinerant teachers or resource room teachers for the visually impaired. (Code 1950, § 22-10.7; 1974, c. 480; 1978, c. 386; 1980, c. 559.)

§ 22.1-217.1. Programs for the research and development of innovative methods of teaching mentally retarded, mentally ill or emotionally disturbed children. — For the purpose of improving the quality of the education and training provided to the school-age residents of the state mental health and mental retardation facilities, there is hereby established a program of grants, from such funds as are appropriated by the General Assembly, to promote the research and development of innovative methods of teaching mentally retarded, mentally ill or emotionally disturbed children in residential settings. This program shall be available to the education directors and instructional staffs of the institutions administered by the Department of Mental Health and Mental Retardation. The Board of Education shall award these grants on the basis of the recommendations of an advisory committee composed of the Director of the Virginia Treatment Center for Children, two representatives of the Department of Education and two representatives of the Department of Mental Health and Mental Retardation. The advisory committee shall establish objectives for these grants, develop requests for proposals and set criteria for evaluating the applications for funds. (1985, c. 332.)

§ 22.1-218. Reimbursement of parents or guardian of handicapped children in private schools; reimbursement of school boards from state funds. — A. If a school division is unable to provide a free appropriate public education to a handicapped child and it is not appropriately available in a state facility, it shall offer to place the child in a nonsectarian private school for the handicapped approved by the Board of Education or such other licensing agency as may be designated by state law. The school board of such division shall pay to, or on behalf of, the parent or guardian of such child the reasonable tuition cost and other reasonable charges as may be determined by the Board of Education. The school board, from its own funds, is authorized to pay such additional tuition or charges as it may deem appropriate. Of the total payment approved by the Board of Education, the school board shall be reimbursed sixty per centum from such state funds as are appropriated for this purpose.

D. Any party aggrieved by the findings and decision made pursuant to the procedures prescribed pursuant to subsections B and C of this section may bring a civil action in the circuit court for the jurisdiction in which the school division is located. In any such action the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.

E. Whenever the Board of Education, in its discretion, determines that a school division fails to establish and maintain programs of free and appropriate public education which comply with regulations established by the Board, the Board may withhold all special education moneys from the school division and may use the payments which would have been available to such school division to provide special education, directly or by contract, to eligible handicapped children in such manner as the Board considers appropriate.

F. The Board of Education shall supervise educational programs for handicapped children by other public agencies and shall assure that the identification, evaluation and placement of handicapped children and youth in education programs by other public agencies, as appropriate, are consistent with the provisions of the Board of Education's special education regulations. (Code 1950, § 22-10.4; 1974, c. 480; 1978, c. 386; 1980, cc. 559, 561; 1981, c. 7; 1982, c. 21; 1985, c. 207.)

§ 22.1-214.1. Issuance of subpoenas by hearing officers. — Any hearing officer appointed pursuant to the procedures provided for in subsections B and C of § 22.1-214 shall have the power to issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the hearing officer does not quash or modify the subpoena at a timely request as illegally or improvidently granted, immediately procure by a petition a decision on the validity thereof in the circuit court of the jurisdiction in which the hearing is to be held. In any case of refusal or neglect to comply with the hearing officer's subpoena, the hearing officer may procure an order of enforcement from such court. (Code 1950, § 22-10.4:1; 1980, c. 561.)

The number of this section was assigned by the Virginia Code Commission, the number in the 1980 act having been 22-10.4:1.

§ 22.1-214.2. Definition of "supervise" as related to educational programs provided for or by Department of Mental Health and Mental Retardation. — For the purposes of subsection F of § 22.1-214 as related to the educational programs provided for or by the Department of Mental Health and Mental Retardation, "supervise" shall mean providing active support in (i) designing mechanisms for maintaining constant direct contact and the sharing of ideas, approaches and innovations between the Department of Mental Health and Mental Retardation and the facility staff responsible for providing educational services; (ii) providing consistent oversight, with particular attention to the mental health programs, to ensure that the availability of educational resources and the distribution of funds clearly reflect the needs of the different student populations residing in the various facilities; (iii) developing guidelines, in cooperation with the Department of Mental Health and Mental Retardation, for the evaluation of the performance of the education directors or other education supervisors employed by the Department of Mental Health and Mental Retardation; (iv) developing and implementing, in cooperation with the Department of Mental Health and Mental Retardation, programs to ensure that the educational and treatment needs of dually diagnosed children in state institutions are met; (v) ensuring that the expertise of the Department of Education is utilized by providing technical assistance to the education programs provided for or by the Department of Mental Health and Mental Retardation in the areas of selection and acquisition of educational materials, curriculum development including vocational education, when appropriate, and applications for federal grants. (1985, c. 207.)

B. Where a school board enters into an agreement with another school division or divisions or a public or private nonsectarian school to pay the tuition cost of special education for handicapped children within its jurisdiction, the Board of Education is authorized to reimburse the school board sixty per centum of its reasonable costs as determined by the Board of Education.

C. The Board of Education is further authorized to reimburse each school board operating a preschool special education program for handicapped children aged two through four, sixty per centum of its costs. (Code 1950, § 22-10.8; 1974, c. 480; 1978, c. 386; 1980, c. 559.)

§ 22.1-218.1. Duty to process placements through the Interstate Compact on the Placement of Children. — In order to protect the interests of the Commonwealth and local governments and provide for the safety and welfare of handicapped children, all placements of handicapped children facilitated by a school division in an out-of-state special education facility shall be processed through the Interstate Compact on the Placement of Children as provided in Chapter 10.1 (§ 63.1-219.1 et seq.) of Title 63.1 of the Code of Virginia. (1983, c. 376.)

§ 22.1-219. Use of federal, state or local funds not restricted. — Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant. (Code 1950, § 22-10.9; 1974, c. 480; 1980, c. 559.)

§ 22.1-220. Power of counties, cities and towns to appropriate and expend funds for education of handicapped children. — The governing body of any county, city or town is hereby authorized and empowered to appropriate and expend funds of the county, city or town in furtherance of the education of handicapped children residing in such county, city or town who attend private, nonsectarian schools, whether within or without the county, city or town and whether within or without the Commonwealth. (Code 1950, § 22-10.10; 1974, c. 480; 1980, c. 559.)

§ 22.1-221. Transportation of handicapped children attending public or private special education programs. — A. Each handicapped child enrolled in and attending a special education program provided by the school division pursuant to any of the provisions of § 22.1-216 or § 22.1-218 shall be entitled to transportation to and from such school or class at no cost if such transportation is necessary to enable such child to obtain the benefit of educational programs and opportunities.

§ 22.1-7. **Responsibility of each state board, agency and institution having children in residence or in custody.** — Each state board, state agency and state institution having children in residence or in custody shall have responsibility for providing for the education and training to such children which is at least comparable to that which would be provided to such children in the public school system. Such board, agency or institution may provide such education and training either directly with its own facilities and personnel in cooperation with the Board of Education or under contract with a school division or any other public or private nonsectarian school, agency or institution. The Board of Education shall supervise the education and training provided to school-age residents in state mental retardation facilities and provide for and direct the education for school-age residents in state mental health facilities in cooperation with the Department of Mental Health and Mental Retardation. The Board shall prescribe standards and regulations for all such education and training provided directly by a state board, state agency or state institution. Each state board, state agency or state institution providing such education and training shall submit annually its program therefor to the Board of Education for approval in accordance with regulations of the Board. If any child in the custody of any state board, state agency or state institution is a handicapped child as defined in § 22.1-213 and such board, agency or institution must contract with a private nonsectarian school to provide special education as defined in § 22.1-213 for such child, the state board, state agency or state institution may proceed as a guardian pursuant to the provisions of § 22.1-218 A. (Code 1950, § 22-9.1:04; 1972, c. 603; 1974, c. 480; 1980, c. 559; 1985, c. 207.)

EDUCATION OF THE HANDICAPPED
20 U.S.C. Secs. 1401-1485

[P.L. 91-230, April 13, 1970, 84 Stat. 121; as amended by P.L. 93-380, August 21, 1974, 88 Stat. 580, by P.L. 94-142, November 29, 1975, 89 Stat. 773, by Pub. L. 95-561, November 1, 1978, 92 Stat. 2364, by Pub. L. 98-199, December 2, 1983, 97 Stat. 1357, by Pub. L. 99-372, August 5, 1986, 100 Stat. 796, and by Pub. L. 99-457, Oct. 8, 1986, 100 Stat. 1145.]

SUBCHAPTER I — GENERAL PROVISIONS

Sec. 1400. Congressional statements and declarations

Short title

(a) This chapter may be cited as the "Education of the Handicapped Act."

Findings

(b) The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met:

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the National interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

Purpose

(c) It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in Section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their u nique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

Pub. L. 91-230, Title VI, Sec. 601, Apr. 13, 1970, 84 Stat. 175, amended by Pub. L. 94-142, Sec. 3(a), Nov. 29, 1975, 89 Stat. 774 [reclassified as Sec. 1400 in 1981].

Sec. 1401. Definitions

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(3).[*] The term "Advisory Committee" means the National Advisory Committee on the Education of Handicapped Children.

*Former subsection (a)(2) was deleted; however, subsections (a)(3) - (a)(22) were not renumbered.

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(4) The term "construction," except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution;

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however*, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered; and

(F) The term includes community colleges receiving funding from the Secretary of the Interior under Public Law 95-471.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more

nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(23) (A) The term "public or private nonprofit agency or organization" includes an Indian tribe. (B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe. (C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(b) For purposes of part C of this title, "handicapped youth" means any handicapped child (as defined in section 602(a)(1)) who—

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

NOTE: (a) Except as provided in subsection (b), the provisions of this Act shall take effect on the date of enactment of this Act.

(b)(1) To the extent that the amendments made by this Act to parts C, D, E, and G of the Education of the Handicapped Act prohibit or limit the use of funds, such amendments shall apply only to funds obligated after the date of enactment of this Act.

(2) As determined necessary by the Secretary of Education for purposes of providing services under the Education of the Handicapped Act pending the issuance of regulations implementing the amendments made by this Act, the Secretary shall provide financial assistance under parts C, D, E, and G of the Act as in effect on the day before the date of enactment of this Act until issuance of such regulations or March 1, 1984, whichever is earlier.

Pub. L. 91-230, Title VI, Sec. 602, Apr. 13, 1970, 84 Stat. 175; amended by Pub. L. 94-142, Sec. 4(a), Nov. 29, 1975, 89 Stat. 775, Pub. L. 98-199, Sec. 2, Dec. 2, 1983, 97 Stat. 1357, and by Pub. L. 99-457, Title IV, Sec. 402, Oct. 8, 1986, 100 Stat. 1172.

Sec. 1402. Office of Special Education Programs

(a) There shall be, within the Office of Special Education and Rehabilitative Services in the Department of Education, an Office of Special Education Programs which shall be the principal agency in the Department for administering and carrying out this Act and other programs and activities concerning the education and training of the handicapped.

(b)(1) The office established under subsection (a) shall be headed by a Deputy Assistant Secretary who shall be selected by the Secretary and shall report directly to the Assistant Secretary for Special Education and Rehabilitative Services. The position of Deputy Assistant Secretary shall be in grade GS-18 of the General Schedule under section 5104 of title 5, United States Code, and shall be a Senior Executive Service position for the purposes of section 3182(a)(2) of such title.

(2) In addition to such Deputy Assistant Secretary, there shall be established in such office not less than six positions for persons to assist the Deputy Assistant Secretary, including the position of the Associate Deputy Assistant Secretary. Each such position shall be in grade GS-15 of the General Schedule under section 5104 of title 5, United States Code.

Pub. L. 91-230, Title VI, Sec. 603, Apr. 13, 1970, 84 Stat. 177; amended by Pub. L. 93-380, Title VI, Sec. 612(a), Aug. 21, 1974, 88 Stat. 579, and by Pub. L. 98-199, Sec. 3(a), Dec. 2, 1983, 97 Stat. 1357.

Sec. 1403. National Advisory Committee on Handicapped Children and Youth

Repealed by Pub. L. 99-457, Title IV, Sec. 407, Oct. 8, 1986, 100 Stat. 1177.

Sec. 1404. Acquisition of equipment and construction of necessary facilities

Authorization for use of funds

(a) In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

Recovery of payments under certain conditions

(b) If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

Pub. L. 91-230, Title VI, Sec. 605, Apr. 13, 1970, 84 Stat. 177.

Sec. 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

Pub. L. 91-230, Title VI, Sec. 606, as added Pub. L. 94-142, Sec. 6(a), Nov. 29, 1975, 89 Stat. 795.

Sec. 1406. Grants for the removal of architectural barriers

(a) The Secretary is authorized to make grants and to enter into cooperative agreements with the Secretary of the Interior and with State educational agencies to assist such agencies in making grants to local educational agencies or intermediate educational units to pay part or all of the cost of altering existing buildings and equipment in accordance with standards promulgated under the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers.

(b) For the purposes of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

Pub. L. 91-230, Title VI, Sec. 607, as added by Pub. L. 94-142, Sec. 6(a), Nov. 29, 1975, 89 Stat. 795, and amended

by Pub. L. 98-199, Sec. 5, Dec. 2, 1983, 97 Stat. 1358, and by Pub. L. 99-457, Title IV, Sec. 401, Oct. 8, 1986, 100 Stat. 1172.

Sec. 1407. Requirements for prescribing regulations

(a) For purposes of complying with section 431(b) of the General Education Provisions Act with respect to regulations promulgated under part B of this Act, the thirty-day period under such section shall be ninety days.

(b) The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act which would procedurally or substantively lessen the protections provided to handicapped children under this Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at IEP meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

(c) The Secretary shall transmit a copy of any regulations promulgated under this Act to the National Advisory Committee on the Education of the Handicapped concurrently with publication in the Federal Register.

Pub. L. 91-230, Title VI, Sec. 608, as added by Pub. L. 98-199, Sec. 6, Dec. 2, 1983, 97 Stat. 1359.

Sec. 1408. Eligibility for Financial Assistance

Effective for fiscal years for which the Secretary may make grants under section 1419(b)(1), no State or local educational agency or intermediate educational unit or other public institution or agency may receive a grant under parts C through G which relate exclusively to programs, projects, and activities pertaining to children aged three to five, inclusive, unless the State is eligible to receive a grant under section 1419(b)(1). Pub. L. 99-457, Title II, Sec. 202, Oct. 8, 1986, 100 Stat. 1158.

SUBCHAPTER II — ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

Sec. 1411. Entitlements and allocations

Formula for determining maximum State entitlement

(a)(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to—

(A) the number of handicapped children aged three to five, inclusive, in a State who are receiving special education and related services as determined under paragraph (3) if the State is eligible for a grant under section 1419 and the number of handicapped chidren aged six through 21, inclusive, in a State who are receiving special education and related services as so determined,

multiplied by—

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purposes of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure," in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures is made), divided by the aggregate number

of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Secretary may not count—

(i) handicapped children aged three to seventeen, inclusive, in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per cent of the number of all children aged five to seventeen, inclusive, in such State and the State serves all handicapped children aged three to five, inclusive, in the state pursuant to State law or practice or the order of any court,

(ii) handicapped children aged five to seventeen, inclusive, in such state under paragraph (1)(A) to the extent the number of such children is greater than 12 percent of the number of all children aged five to seventeen, inclusive, in such State and the State does not serve all handicapped children aged three to five, inclusive, in the State pursuant to State law or practice on the order of any court; and

(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to him.

Distribution and use of grant funds by States for fiscal year ending September 30, 1978

(b)(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412(3) of this title.

(2) Of the funds which any State may use under paragraph (1)(A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(c)(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (4), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

(i) an amount which is equal to the greater of—

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $350,000

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the part remaining after use in accordance with clause (i) shall be used by the State (I) to provide support services and direct services in accordance with the priorities established under section 1412(3), and (II) for the administrative costs of monitoring and complaint investigation but only to the extent that such costs exceed the costs of administration incurred during fiscal year 1985.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph 2.

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

Allocation of funds within States to local educational agencies and intermediate educational units

(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, each local educational agency and intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

Territories and possessions

(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Secretary in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Secretary pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of such jurisdictions shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

Indian reservations

(f)(1) The Secretary may make payments to the Secretary of the Interior according to the need for assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1.25 percent of the aggregate amounts available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which—

(A) meets the applicable requirements of sections 1412, 1413, and 1414(a),

(B) includes satisfactory assurance that all handicapped children aged 3 to 5, inclusive, receive a free appropriate public education by or before the 1987-1988 school year,

(C) includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and designated local school boards before adoption of the policies, programs, and procedures required under sections 1412, 1413, and 1414(a), and

(D) is approved by the Secretary.

Section 1416 shall apply to any such application.

Reductions or increases

(g)(1) If the sums appropriated under subsection (h) for any fiscal year for making payments to States under subsection (a) are not sufficient to pay in full the total amounts which all States are entitled to receive under subsection (a) for such fiscal year, the maximum amounts which all States are entitled to receive under subsection (a) for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full

the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this section. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies and intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(h) For grants under subsection (a) there are authorized to be appropriated such sums as may be necessary.

Pub. L. 91-230, Title VI, Sec. 611, Apr. 13, 1970, 84 Stat. 178; amended by Pub. L. 93-380, Title VI, Secs. 614(a), (c)(1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub. L. 94-142, Secs. 2(a)(1)-(3), 5(a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794; Pub. L. 96-270, Sec. 13, June 14, 1980; Pub. L. 98-199, Sec. 15, Dec. 2, 1983, 97 Stat. 1357; and by Pub. L. 99-457, Title II, Sec. 201, and Title IV, Secs. 403, 404, Oct. 8, 1986, 100 Stat. 1155 and 1173.

Sec. 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular

educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub. L. 91-230, Title VI, Sec. 612, Apr. 13, 1970, 84 Stat. 178; amended by Pub. L. 92-318, Title IV, Sec. 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, Title VI Secs. 614(b), (f)(1), 615(a), Title VIII, Sec. 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub. L. 94-142, Secs. 2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780; and by Pub. L. 99-457, Title II, Sec. 203, Oct. 8, 1986, 100 Stat. 1158.

Sec. 1413. State Plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2) and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the in-service training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the

State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of his responsibilities under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to (A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of this agreement;

(14) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including —

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Secretary shall approve any State plan and any modification thereof which—

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Secretary shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

Participation of handicapped children in private schools

(d)(1) If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4), the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4).

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this part to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4).

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(e) This Act shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for handicapped children within the State.

APPENDIX C

John GREEN, individually and on behalf of all those similarly situated, Plaintiffs,

v.

Charles JOHNSON et al., Defendants.

Civ. A. No. 79-1358-F.

United States District Court, D. Massachusetts.

May 8, 1981.

While a 21-year-old inmate at Franklin County House of Correction plaintiff brought action seeking declaratory and injunctive relief complaining of alleged failure to deliver required special education services to inmates who were under age of 22, had not received a high school diploma and were eligible for free and appropriate special education under state and federal law. Plaintiff moved for class certification and preliminary injunction and several defendants moved to dismiss. The District Court, Freedman, J., held that: (1) resolution of who had responsibility under state law to provide special education services was for state courts in the first instance; (2) although plaintiff's individual claims had become moot, mootness was not a bar to class certification; (3) class composed of all inmates at Franklin and Hampshire County Houses of Correction would be conditionally certified; (4) incarcerated status of plaintiff class did not vitiate their entitlement to free and appropriate special education under federal and state laws; (5) preliminary injunction would issue enjoining state defendants from failing to provide special education services to plaintiff class; and (6) sheriffs of those counties at which inmates of houses of correction were receiving services to which they were entitled were to be dismissed.

Preliminary injunction issued; class certified; motions to dismiss allowed in part.

1. Federal Courts ⇐392

In action by inmate of Massachusetts county houses of correction seeking declaratory and injunctive relief concerning providing of special education services to minor inmates with learning disabilities, resolution of state law question of who had initial or primary responsibility for provision of direct special education services to inmates was to be undertaken in the first instance in state courts, either by an action seeking declaratory judgment or by certification of questions to the Supreme Judicial Court of the Commonwealth of Massachusetts. Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.; M.G.L.A. c. 127, § 48; Mass.S.J.C. Rule 3:21.

2. Courts ⇐495

Federal Civil Procedure ⇐186.10

Failure of defendants to secure resolution of state law question of responsibility for delivery of special education services to inmates at Massachusetts county houses of correction did not preclude federal court from considering merits of inmates' claims to entitlement to special education services under federal and state law as well as motions for class certification and for preliminary injunction. Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.; M.G.L.A. c. 127, § 48; Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

3. Declaratory Judgment ⇐204

Since plaintiff, seeking declaratory and injunctive relief regarding delivery of special educational services to inmates under age of 22 at Massachusetts county houses of correction, had received a general equivalency diploma and had been released from custody his claims against state defendants were moot and, also, since inmates at two houses of correction were being identified, referred, evaluated and having individualized education programs prepared for them, and were receiving special education services set forth in their IEP's, their claims as potential class members were also moot. Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.; M.G.L.A. c. 127, § 48; Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

4. Federal Civil Procedure ⇐164.5

Mootness of representative plaintiff's claims was no bar to class certification of action seeking declaratory and injunctive relief regarding delivery of special educational services to inmates under age of 22 incarcerated at Massachusetts county houses of correction; because of revolving nature of inmate population and length of time between filing of complaint and class certification the claims would be capable of repetition yet evasive of review and existence of inmates not receiving special education services was certain and counsel had a sufficient interest in protecting rights of inmates being denied such services. Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.; M.G.L.A. c. 127, § 48; Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.; U.S.C.A.Const. Art. 3, § 2, cl. 1.

5. Federal Civil Procedure ⇐186.10

In view of large number of inmates of one county house of correction who were under 22 and without high school diplomas a significant percentage of that group was probably in need of special education services, and since at least four inmates at another county's facility had individualized education programs prepared for them and were not receiving services, with from one to seven potentially eligible inmates being admitted each month, such evidence, considered in light of constantly revolving inmate population, establishes sufficient numerosity that joinder of all potential members was impractical for purpose of maintaining as class action suit challenging failure to provide special education programs to those otherwise eligible inmates in need of special education services. M.G.L.A. c. 15, § 1M; c. 71B, § 1 et seq.; Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.; Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.

6. Federal Civil Procedure ⇐186.10

A class composed of all inmates at Franklin and Hampshire County Houses of Correction who were under age 22, without high school diplomas and eligible for a free and appropriate special education, was certified for purpose of action complaining of denial of special education services to allegedly qualified inmates; although inmates at Franklin County House of Correction were being referred, evaluated and having individualized education programs prepared while inmates at Hampshire facility were not, common claims of inmates at both facilities were that no services were being provided and, hence, no subclass of inmates at Franklin would be certified. M.G.L.A. c. 15, § 1M; c. 71B, § 1 et seq.; Fed.Rules Civ.Proc. Rules 23, 23(c)(4), 28 U.S.C.A.; Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.

7. Schools ⇐150

Although incarcerated status of those inmates of Massachusetts county houses of correction under age of 22 and in need of special education services might require adjustments in the particular special education programs available to them as compared to programs available to children with special education needs who were not incarcerated, their incarcerated status did not eviscerate their entitlement to such services under federal and state law. Education of the Handicapped Act, §§ 602(16), 612(1), (2)(B), (4, 6) as amended 20 U.S.C.A. §§ 1401(16), 1412(1), (2)(B), (4, 6); M.G.L.A. c. 15, § 1M; c. 71B, §§ 1, 3, 12.

8. Injunction ⇐136(2)

Preliminary injunction issued enjoining Massachusetts defendants from failing to provide special education services to inmates at Franklin and Hampshire County Houses of Correction who were under 22 years of age and without high school diplomas and who were found to be in need of special education services in accordance with terms of inmates' individualized education programs. Education of the Handicapped Act, §§ 602(16), 612(1), (2)(B), (4, 6) as amended 20 U.S.C.A. §§ 1401(16), 1412(1), (2)(B), (4, 6); M.G.L.A. c. 15, § 1M; c. 71B, §§ 1, 3, 12.

9. Federal Civil Procedure ⇐1750

Because inmates at two Massachusetts county houses of correction were receiving

special education services to which they were entitled under state and federal law and no controversy regarding such facilities remained before the court in inmate action for declaratory and injunctive relief, presence of sheriffs of such counties was no longer necessary and their motions to dismiss were allowed. Education of the Handicapped Act, § 602 et seq. as amended 20 U.S.C.A. § 1401 et seq.; M.G.L.A. c. 15, § 1M; ch. 71B, § 1 et seq.

Victoria Pulos, Western Mass. Legal Services, Northampton, Mass., Ira Horowitz, Susan Bennett, Western Mass. Legal Services, Springfield, Mass., for plaintiffs.

W. Michael Ryan, Ryan & Ryan, Northampton, Mass., for John Boyle.

J. David Keaney, Egan, Flanagan & Egan, Springfield, Mass., for Michael J. Ashe.

Terry Jean Seligmann, Asst. Atty. Gen., Government Bureau, Boston, Mass., for State defendants.

Geoffrey A. Wilson, Trudel, Bartlett, Barry & Filler, Greenfield, Mass., for Donald M. McQuade.

James A. Bowes, North Adams, Mass., Charles M. Maguire, Donovan & O'Connor, Adams, Mass., for Carmen Massimiano.

MEMORANDUM, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

FREEDMAN, District Judge.

This action came to be heard on March 3, 1981 regarding the motions of the plaintiff John Green for certification of a class pursuant to F.R.Civ.P. 23, and for a preliminary injunction pursuant to F.R.Civ.P. 65; also heard were the motions of defendants Ashe and Massimiano to dismiss the case as to them pursuant to F.R.Civ.P. 12(b)(6). Following the hearing, defendant John Boyle also moved to dismiss, and this motion is also considered herein.

In prior proceedings I heard the state defendants' (as defined herein) motions to dismiss and by Memorandum and Order dated February 24, 1981 denied those motions.

Based upon my review of the evidence presented by the parties through answers to interrogatories, affidavits and testimony at the hearing, and after careful consideration of the arguments of the parties at the hearing and in their memoranda, and with due regard for the proposed orders submitted by plaintiff and defendants, I am entering the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Plaintiff John Green filed this action in 1979 while a twenty-one year old inmate serving a sentence at the Franklin County House of Correction. He brought suit seeking declaratory and injunctive relief for himself and a class of persons he identified in ¶ 17 of the complaint as follows: present and future inmates of the Franklin, Hampshire, Hampden, and Berkshire County Houses of Correction who are under the age of twenty-two, have not received a high school diploma, and are eligible for a free and appropriate special education.

2. Plaintiff has received a General Equivalency Diploma and has been released from custody since the initiation of this action. Intervenors on plaintiff's side have likewise either been released from custody, received the services which they sought, or are no longer entitled to those services.

3. Plaintiff and the intervenors on plaintiff's side have been represented throughout this litigation by attorneys from Western Massachusetts Legal Services.

4. The defendants in this action fall into two discrete groups. The first group is composed of various officials of the Commonwealth of Massachusetts involved in the planning, funding, and delivery of educational services in the Commonwealth, who are identified collectively herein as the "state defendants." The second group is composed of the sheriffs of the Houses of Correction of Franklin, Hampshire, Hampden, and Berkshire Counties.

5. In his complaint, plaintiff alleged that because of the policies and practices

adopted by the state defendants with regard to the delivery of special education services to inmates incarcerated at the four County Houses of Correction named above, he and the class he sought to represent were being denied special educational services to which they were entitled under federal and state law.

6. However, in the interim between filing of the suit and the hearing on March 3, 1981, funding for the delivery of special educational services at the Hampden and Berkshire County Houses of Correction has been arranged under one-year grants. These funding arrangements are discussed in more detail, *infra*.

A. The Existence of a Class

7. The plaintiff has submitted the affidavit of Dr. Milton Budoff, a psychologist specializing in the area of special needs of handicapped children and their special educational needs. Based on this affidavit, I find as follows:

A. A variety of studies indicate the high prevalence of serious academic difficulties among delinquent children.

B. According to a national survey of handicapped children eligible for special education services incarcerated in juvenile correctional institutions:

1. Compared to the national average incidence of handicapped children of 12.3% some type of handicapping condition is found to exist in 42.4% of delinquent children committed to correctional institutions.

2. The handicapping conditions with the highest incidence rates in correctional facilities were:

a) emotional disturbance (16.23%);

b) learning disabilities (10.59%); and

c) educable mental retardation (7.69%).

C. Experts have estimated the extent of mental retardation within youth correctional institutions at between 3% and 9.5%.

D. Of a study group of 477 delinquent children, 60% were found to be two or more years retarded in their expected reading levels.

E. An expert has found that 50% to 80% of delinquents have some form of learning disability while learning disabled children form only 12% of total children.

F. A screening test of over 100 juvenile delinquents revealed that 81% were learning disabled.

G. An expert has found that an unexpectedly high proportion of delinquents in youth-service detention centers in Massachusetts have neurological symptoms associated with learning disabilities.

8. Based on these findings, I further find that among the inmate populations of the County Houses of Correction of Franklin, Hampshire, Hampden and Berkshire Counties, a significant number of inmates are apt to have learning disabilities and other educational handicaps.

9. Regarding the number of inmates at the County Houses of Correction of Franklin, Hampshire, Hampden and Berkshire Counties who are under age twenty-two and without high school diplomas, I make the following findings based on answers to interrogatories, exhibits attached to a stipulation reached by the parties, exhibits introduced by plaintiff, and the testimony of Paul Cohen, Special Education Coordinator at the Franklin County House of Correction, and James McCauley, Correctional Services Educational Coordinator for the Hampshire County House of Correction:

A. Statistics compiled by the Statewide Priority Populations Program indicate that approximately one quarter of the inmate population in Massachusetts is under twenty-two years of age and that over 70% are without a high school diploma.

B. Admissions data from 1976 to 1980 at the Berkshire County House of Correction shows that 56% of the sentenced inmates are between the ages of seventeen and twenty-two and that 70% do not have a high school diploma.

C. Statistics gathered by the Hampden County House of Correction show that it confines over 600 sentenced inmates in a year, that at any given point in time one-half is under the age of twenty-two and that 75% of those under twenty-two do not have high school diplomas and are eligible for special education services.

D. Monthly reports compiled by Paul Cohen show that the number of inmates at the Franklin County House of Correction under twenty-two years of age who were without a high school diploma was 16 in January 1980; 12 in February 1980; 12 in March 1980; and 12 in April 1980.

E. Monthly reports compiled by Debbie Burzdak, former Special Education Coordinator for the Hampshire County House of Correction show that of the 23 inmates under twenty-two in the facility in October 1979, 18 did not have a high school diploma; of the 25 inmates under twenty-two in November 1979, 19 did not have a diploma; of the 26 inmates under twenty-two in December 1979, 19 did not have a diploma; of the 28 inmates under twenty-two in January 1980, 19 did not have a diploma; of the 30 inmates under twenty-two in February 1980, 17 did not have a diploma; of the 28 inmates under twenty-two in March 1980, 19 were without diplomas; and of the 27 inmates in April 1980, 15 had no diplomas.

F. The Hampshire County House of Correction has an annual inmate population of 250 to 300; an average daily count of 90; and in October 1979, 18 inmates under twenty-two without a high school diploma.

G. The Franklin County House of Correction has an average daily count of 40.02, and in October 1979, 6 inmates under twenty-two without a high school diploma.

H. The Berkshire County House of Correction has an annual inmate population of 300; an average daily count of 65.2 inmates in 1977 to 1978, and 69.8 in 1978 to 1979.

I. The Hampden County House of Correction has an annual inmate population of 600 and as of February 1980, there were 60 inmates under twenty-two without a high school diploma.

J. A substantial number of inmates between ages seventeen and twenty-two who are without high school diplomas, and who have a high probability of special education needs are presently and at any given point in time incarcerated at the correctional facilities in Hampshire, Hampden, Berkshire and Franklin Counties.

K. The inmate populations at the Hampden, Hampshire, Berkshire and Franklin County Houses of Correction are constantly revolving.

10. Regarding the inmate population at the Franklin County House of Correction, I find as follows:

A. Paul Cohen is the Special Education Coordinator at the Franklin County House of Correction. He screens all inmates at the facility who are under twenty-two years of age and are without a high school diploma. Since January 1980, he has interviewed 31 inmates in this group who expressed an interest in special education.

B. Cohen has referred 15 of the 31 inmates for a special education evaluation, of which four or five remain in the Franklin County House of Correction. Individualized Education Plans (IEP's) were developed for five of the 15 inmates referred.

C. Inmates at Franklin stay from 30 days to one and one-half years with an average stay of six to eight months. From one to seven new inmates who are between seventeen and twenty-two years old and without high school diplomas are admitted each month.

D. Of the five inmates who were referred for evaluation and had IEP's

prepared, none has received the services listed in the IEP because the Franklin facility does not have a special education program to implement the IEP's of these inmates.

E. Inasmuch as he knows the Franklin facility will not provide the special educational services set out in an inmate's IEP, Cohen does not refer inmates for evaluations immediately after the screening interview, but rather waits until the inmate's release date approaches.

11. Regarding the Hampshire County House of Correction, I find as follows:

A. James McCauley is employed by the Hampshire House of Correction as the Education Coordinator. He and his staff operate the educational program at the Hampshire facility. Although he is a certified teacher, McCauley is not certified to teach special education.

B. The Hampshire facility provides educational services to its inmates including vocational education and classes in preparation for the General High School Equivalency Test.

C. When an inmate is admitted to the Hampshire facility, he is interviewed by an institutional caseworker. If the inmate wishes, he is referred to McCauley who assesses the inmate's needs by giving the inmate the Test of Adult Basic Education. Based on test results, McCauley develops an educational plan for the inmate. McCauley also attempts to obtain the educational history of the inmate, including school records.

D. McCauley has performed educational assessments for 50 inmates referred to him by caseworkers since July 1980. Of the 50 inmates assessed by McCauley, 70% had received special educational assessments by their former school districts under state law.

E. Of the 50 inmates assessed by McCauley, over one-half were under age twenty-two and of that one-half, 85% did not have a high school diploma.

F. McCauley has not referred any inmate for special educational evaluation, and no special educational services in accordance with an IEP are being provided to inmates at the Hampshire facility.

B. Preliminary Injunction

12. Inmates at the Franklin County House of Correction, although referred to their local school committees for special education evaluation and preparation of IEP's, are not receiving the special educational services set out in their IEP's.

13. Inmates at the Hampshire County House of Correction are not being referred to their local school committees, and thus are neither being evaluated nor having IEP's prepared for them. As a result, special educational services as set out in an IEP are not being delivered to inmates at this facility.

14. Inmates at the Hampden and Berkshire County Houses of Correction are being referred and evaluated, and are having IEP's prepared for them. Delivery to inmates of special education services described in their IEP's is taking place because both facilities have hired a part-time special education teacher and coordinator for 1980–1981 under grants from the Massachusetts Department of Education.

15. Based on the affidavit of Milton Budoff, *supra*, I find as follows:

A. Incarceration in a county jail for an extended period of time can cause harm or loss of opportunity to children when educational programs appropriate to their special needs are denied them or are simply not available. Some inmates who were making progress in a special education school program prior to incarceration may show a marked deterioration in skills. Other inmates because of the lack of special education programs geared to their individual needs during incarceration may be unprepared for job-related training upon release.

B. Although some educational program may be available, it may be of little or no value to an inmate with special needs. Long periods of unproductive time, accompanied by backsliding, reinforcement of low self-esteem, and an increase of frustration can result.

16. Because inmates are only eligible for special education up to age twenty-two under Massachusetts law, the absence of special educational services during incarceration may result in an inmate's ineligibility for services upon release if he is then over age twenty-two, and in any event will always result in a shortened period of eligibility for the actual delivery of services.

17. Based on the stipulation entered into by the parties and the affidavit of Roger W. Brown, Associate Commissioner for Special Education for the Commonwealth, I find as follows:

A. The Massachusetts Department of Education has designated special needs inmates in County Houses of Correction as among its first priorities in 1980-1981. The Department of Education acting through its Division of Special Education has made intensive efforts to assist in the identification of inmates in County Houses of Correction who may have special needs, and to improve access to special education services for this population.

B. As a part of these efforts, the Department of Education awarded a grant to a private, non-profit agency, the Federation for Children with Special Needs [the Federation], for a program entitled Special Education Coordinator Team for Massachusetts in 1980-1981. This grant was to support the work of special education coordinators (liaison coordinators) who assist local school districts and County Houses of Correction in identifying eligible inmates who may have special needs and who wish to be referred for special education evaluations. These coordinators also were to identify appropriate assessment and service delivery resources in order to facilitate the development of Individual Educational Plans. The Fiscal Year 1981 grant to the Federation totals $190,014.

C. In addition to the grant to the Federation, the Department of Education made available in Fiscal Year 1981 a separate pool of federal special education funds for all County Houses of Correction that might choose to apply for the funds for the hiring of teaching staff to provide direct special education services to eligible inmates.

18. At one time, liaison coordinators funded by the grant to the Federation were working in the County Houses of Correction in Franklin, Hampshire, Hampden and Berkshire Counties. However, no liaison coordinator is presently at the Hampshire County facility.

19. Hampden and Berkshire Counties applied for and were awarded grants from the separate pool of federal special education funds for the hiring of teaching staff described in the Complaint, ¶ 17, *supra*. The Houses of Correction of Franklin and Hampshire Counties have not applied for these grants.

20. The Department of Education has no funds, federal or state, at the present time which can be granted to the County Houses of Correction to develop special education programs.

21. The Department intends to set aside for Fiscal Year 1982 a joint pool of federal adult education funds and special education funds so that grants may be awarded to the County Houses of Correction. The total amount of this fund, subject to appropriation, will be between $300,000 and $400,000.

22. The conflicting interpretations of Massachusetts General Laws (M.G.L.) c. 127 § 48 made by the state defendants and the Sheriffs of the County Houses of Correction have resulted in disputes regarding upon whom the Massachusetts legislature has placed the initial or primary responsibility for the actual delivery of special education services to inmates in the County Houses of

Correction. In the context of these disputes, and based upon the affidavit of Roger Brown and the representations of counsel for the parties in their memoranda and at oral argument, I find the following: [1]

A. The state defendants believe that the best model to be used in the County Houses of Correction in delivering special education services to inmates is a joint adult education and special education grant, and that this is the best way to provide the broad range of educational services plaintiffs need.

B. The Department of Education distinguishes between the determination of need for special education on the one hand, and the actual delivery of special education services on the other hand. The Department has taken the position that while school committees under their jurisdiction are required to identify, evaluate and develop IEP's for inmates at the County Houses of Correction, it is the responsibility of the administrators of these facilities (i. e. the Sheriffs) to actually deliver the services set forth in an IEP to an inmate while incarcerated.

C. The Sheriffs have taken the position that the delivery of special education services to inmates at their facilities is not within their responsibilities under M.G.L. c. 127 § 48.

D. The Sheriffs of the Hampshire and Franklin County Houses of Correction did not apply for special education grants from the Department of Education in Fiscal Year 1981 because they understood that as a condition of the grant they would be required to pay for services after the first year.

E. The positions taken by the respective defendants follow from their good faith interpretation of a seemingly ambiguous state statute, and are not the result of intentional evasion of responsibility.

F. While the Department of Education has taken a number of steps to assure that the Sheriffs of the County Houses of Correction meet what the Department believes to be the responsibility of the Sheriffs, the Department has not as yet sought judicial interpretation of M.G.L. c. 127 § 48 in state court.

II. CONCLUSIONS OF LAW

A. *General*

1. Jurisdiction is vested in this Court to hear plaintiff's claims pursuant to The Handicapped Children Education Act (Handicapped Act), P.L. 94-142, 89 Stat. 773-796 presently codified in 20 U.S.C. §§ 1401 *et seq.*, by 20 U.S.C. § 1415(e)(4); and to hear plaintiff's claims under state law by the principles of pendent jurisdiction.[2]

2. The Handicapped Act establishes a program of cooperative federalism which sets minimum standards with which states must comply in order to be eligible to receive grants of money to assist state and local educational agencies in the provision of a "free and appropriate public education," as defined in 20 U.S.C. § 1401(18).

3. Some of the minimum standards with which states must comply are the following:

1. Because the Findings of Fact which follow relate to the positions taken by various defendants as a result of their interpretations of state law, these findings are necessarily admixtures of law and fact, yet are presented here for the purpose of explaining the underlying state law issue in this case. The text of M.G.L. c. 127 § 48 is set forth in relevant part in ¶ 9 of the Conclusions of Law.

2. Plaintiff alleged that this action also arises under the Equal Protection Clause of the U.S. Constitution, Amendment XIV and the Rehabilitation Act of 1976, 29 U.S.C. § 794, and thus alleged a jurisdictional basis in 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3), as well as 28 U.S.C. §§ 2201 and 2202. Inasmuch as I base my ruling on The Handicapped Children Education Act's jurisdictional provision, I do not address these other jurisdictional grounds.

A. States must have in effect a policy that assures all handicapped children the right to a free and appropriate public education, 20 U.S.C. § 1412(1), and must develop plans which detail policies and procedures which insure the realization of that right, *id.* § 1412(1), (2).

B. States must establish the requisite procedural safeguards, *id.* § 1412(5), and must insure that local educational agencies will establish individualized education programs (IEP's). Id. § 1412(4).[3]

C. States must insure that "a free and appropriate public education will be available for all handicapped children between the ages of three and twenty-one within the state no later than September 1, 1980...," *id.* § 1412(2)(B), unless application of this requirement with respect to three to five and eighteen to twenty-one year olds would be inconsistent with state law or practice or the order of any court respecting public education within such age groups in the state. *Id.*

3. The Handicapped Act requires that:

The state educational agency shall be responsible for assuring that the requirements [of this Act] are carried out and that all educational programs for handicapped children within the state, *including all such programs administered by any other state or local agency*, will be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and shall meet educational standards of the state educational agency.

Id. § 1412(6) (emphasis supplied). Thus, the ultimate responsibility for administrative oversight of the delivery of education programs for handicapped children lies with the state educational agency, *id.*, *see also* 45 C.F.R. § 121a.500(a) (1980).

4. The Commonwealth of Massachusetts enacted legislation designed to deliver education services to "special needs students" even before the enactment of the Handicapped Act in 1975. St.1972, c. 766, presently codified in M.G.L. c. 71B §§ 1 *et seq.* and c. 15 § 1M. This state law, popularly known as "Chapter 766," provided for the creation of a division of special education within the Commonwealth's Department of Education "to regulate all aspects of, and assist with the development of all special education programs supported in whole or in part by the Commonwealth." M.G.L. c. 15 § 1M(2).

5. Chapter 766 also requires the school committee of every city, town, or school district to "identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, prepare a special educational program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided, and make such reports as the [Massachusetts D]epartment [of Education] may require." M.G.L. c. 71B § 3.

6. For purposes of Massachusetts law, a "school age child" is any person of ages three through twenty-one who has not obtained a high school diploma or its equivalent. *Id.* § 1.

3. An IEP is defined as:

[A] written program for each handicapped child developed in any meeting by a representative of the local education agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents, or guardian of such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19).

7. Massachusetts receives federal funds under the Handicapped Act, and must comply with the minimum requirements set forth in that Act.

8. Chapter 766, in accordance with the Handicapped Act, establishes that the initial or primary responsibility for identifying and evaluating children with special education needs, and for preparing IEP's and delivering services to them lies with local education agencies. M.G.L. c. 71B § 3; *see also* 20 U.S.C. §§ 1401(8) and 1413; 45 C.F.R. §§ 121a.304 and 121a.600 (1980).

9. M.G.L. c. 127 § 48, enacted the day after c. 766, *see* St.1972, c. 777 § 12, provides in relevant part:

> The commissioner [of corrections] shall establish and maintain education, training and employment programs for persons committed to the custody of the department. *The administrators of county correctional facilities shall establish and maintain such programs for persons committed to such facilities. Such programs shall include opportunities for academic education, vocational education, vocational training, other related prevocational programs and employment, and may be made available within correctional facilities or . . . at other places approved by the commissioner or administrator. . . .*

Id. (emphasis supplied).

[1] 10. The language of M.G.L. c. 127 § 48 is, as a matter of law, not given to ready construction for determining who has the initial or primary responsibility for the provision of direct special educational services to inmates at County Houses of Correction.

11. Resolution of this state law question may and should be undertaken in the first instance in the state courts of the Commonwealth, either by an action seeking declaratory judgment or by certification of questions to the Supreme Judicial Court of the Commonwealth pursuant to S.J.C. Rule 3:21. *See Kartell v. Blue Shield of Massachusetts, Inc.*, 592 F.2d 1191, 1194-95 (1st Cir. 1979).

[2] 12. Given the failure of any of the defendants to secure resolution of this state law question of initial or primary responsibility for the delivery of special education services to inmates at County correctional facilities and the ongoing non-delivery of services to inmates at the Hampshire and Franklin County Houses of Correction, separation of this underlying issue of state law from the issues raised by plaintiff's action does not preclude this court from considering the merits of plaintiff's claims and his motions for class certification and for a preliminary injunction.

B. Class Certification

13. A party seeking class certification under F.R.Civ.P. 23 bears the burden of showing that the four requirements of F.R.Civ.P. 23(a) are satisfied, and that a class action is maintainable under F.R.Civ.P. 23(b).

14. Plaintiff has alleged that the state defendants have acted or refused to act on grounds generally applicable to the class he seeks to represent, thereby making appropriate final injunctive relief in corresponding declaratory relief with respect to the class as a whole. F.R.Civ.P. 23(b)(2).

[3] 15. Because plaintiff himself has received a General Equivalency Diploma and has been released from custody, his claims against the state defendants are moot. With respect to inmates at the Berkshire and Hampden County Houses of Correction, because these inmates are now being identified, referred, evaluated and are having IEP's prepared for them, and are receiving the special education services set forth in their IEP's, their claims as potential class members are also moot.

16. Usually, there must be "a named plaintiff who has . . . a [live] case or controversy at the time a complaint is filed, and at the time the class action is certified by the district court pursuant to Rule 23 . . ." in order to satisfy Article III of the U.S. Constitution, *Sosna v. Iowa*, 419 U.S. 393, 402, 95 S.Ct. 553, 558, 42 L.Ed.2d 532 (1975). However, "[t]here may be cases in which

the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Id.* at 402 n. 11, 95 S.Ct. at 559 n. 11. *See also, Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 861 n. 11, 43 L.Ed.2d 54 (1975).

[4] 17. Thus, the mootness of plaintiff John Green's claims at the present time is not an absolute bar to class certification under Article III. Because of the revolving nature of the inmate population at the County House of Correction and the length of time between filing of a complaint and ruling on a motion for class certification, the claims asserted may be capable of repetition yet evasive of review.

18. The circumstances of this case parallel those described in *Gerstein v. Pugh, supra.* An inmate seeking special education services may be released from custody because of reversal of his conviction on appeal, parole, or completion of his sentence. It is by no means certain that any inmate at the County Houses of Correction would be in custody long enough for this Court to certify the class before his claims were mooted. The existence of inmates who are not receiving special education services is certain. The attorneys representing plaintiffs are federally-funded legal services lawyers with sufficient interest in protecting the rights of inmates being denied services to assure a continuing live interest in this case. Cf. *Gerstein v. Pugh*, 420 U.S. at 110 n. 11, 95 S.Ct. at 861 n. 11. As was held in *Gerstein*, "this case is a suitable exception" to the requirement of *Sosna. Id.*

[5] 19. F.R.Civ.P. 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. The evidence presented by plaintiffs indicates that a large number of inmates at the Hampshire County House of Correction are under twenty-two and without high school diplomas, and a significant percentage of this group may be in need of special education services. In addition, at least four inmates at the Franklin facility have had IEP's prepared for them and are not receiving services, and from one to seven potentially eligible inmates are admitted each month. This evidence of numerosity, considered in light of the fact that the inmate population at these facilities is constantly revolving, establishes sufficient numerosity that joinder of all potential members of the class is impracticable. *See Yaffee v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972).

20. F.R.Civ.P. 23(a)(2) requires that there be questions of law and fact common to the class. The class members in the instant case share a common factual identity of being inmates in County Houses of Correction who are either entitled, or potentially entitled, to special education services but not receiving them. Although some inmates have already had IEP's prepared for them, while others have not had the opportunity to be referred or evaluated, all members of the class in common are not receiving special education services.

21. Plaintiff John Green's claims at the time of filing the complaint were typical of claims of the class he seeks to represent and did not conflict with the interests of other members of the class. Thus the requirements of F.R.Civ.P. 23(a)(3) are met.

22. F.R.Civ.P. 23(a)(4) requires that the representative party be such as to ensure fair and adequate protection of the interests of the class. Plaintiff is represented by legal services attorneys who have experience in representing persons in institutional settings, in representing juveniles in education and other matters, and in conducting class action legislation. Plaintiff, acting through his attorneys, will fairly and adequately protect the interests of the members of the class.

23. Because the defendants have acted or refused to act on grounds generally applicable to the class in failing to provide special education services and thereby final injunctive and declaratory relief with re-

spect to the class as a whole is appropriate, plaintiff's class action may be maintained under F.R.Civ.P. 23(b)(2).

[6] 24. A class composed of all inmates at the Franklin and Hampshire County Houses of Correction who are under age twenty-two, without high school diplomas and are eligible for a free and appropriate special education will be certified; however, F.R.Civ.P. 23(c) provides for conditional certification, subject to alteration and amendment before decision on the merits of an action. Since it is possible that subsequent developments in this suit may reveal that 1) inmates entitled to referral and evaluation, preparation of IEP's and delivery of services do not wish to participate in special education programs; 2) that the number of inmates actually entitled to services is small and joinder of their individual claims is not impracticable; or 3) that inmates simply do not wish to participate in or proceed with this litigation, certification of this class is conditional.

25. Although F.R.Civ.P. 23(c)(4) provides for division of a class into subclasses and treatment of each subclass as a class, such division is not appropriate in this case. While inmates at the Franklin House of Correction are being referred, evaluated, and having IEP's prepared for them on the one hand, and inmates at the Hampshire facility are not, on the other hand, the common claim of inmates at both correctional facilities is that no services are being provided. The subclass of inmates at Franklin probably would not independently satisfy the requirements of F.R.Civ.P. 23(a) and their claims would be left in isolation. As was said in *Yaffee v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972) at the juncture of ruling on a motion for class certification, "unless a claim is patently frivolous, [the] court should ask itself: assuming there are important rights at stake, what is the most sensible approach to the class determination issue which can enable the litigation to go forward with maximum effectiveness from the viewpoint of judicial administration?" *Id.* Maximum effectiveness in this case will be achieved by the conditional certification of the class as composed of inmates at both Hampshire and Franklin who are under twenty-two, without high school diplomas, and entitled to a free and appropriate special education.

C. Preliminary Injunctive Relief

26. Plaintiff seeks a preliminary injunction to "enjoin the state defendants from failing to assure that plaintiff class members in Hampshire and Franklin County Houses of Correction receive the special education and related services to which they are entitled."

27. In the First Circuit, a four-prong standard applies to the issuance of preliminary injunctions: plaintiff must demonstrate 1) irreparable injury; 2) a likelihood of success on the merits of the claim; 3) that the balance of hardships tips in his favor; and 4) that the public interest would be furthered by issuance of preliminary relief. *See Automatic Radio Manufacturing Company v. Ford Motor Company*, 390 F.2d 113 (1st Cir.) *cert. denied* 391 U.S. 914, 88 S.Ct. 1807, 20 L.Ed.2d 653 (1968).

28. The plaintiff has demonstrated that the class of inmates under twenty-two, without high school diplomas, entitled to a free and appropriate special education are harmed by not receiving services to which they are entitled. The nature of the injury to the class accrues with the passage of time and cannot be remedied through damages. Absent the issuance of a preliminary injunction, this harm to the plaintiff class is significant, ongoing, and irreparable.

[7] 29. The plaintiff class has demonstrated to a likelihood that they are entitled to a free and appropriate special education under federal and state law. Their incarcerated status may require adjustments in the particular special education programs available to them as compared to programs available to children with special education needs who are not incarcerated, but their incarcerated status does not eviscerate their entitlement under federal and state law. *See, e. g.* 20 U.S.C. § 1401(16), 45 C.F.R. § 121a.14(a)(1), M.G.L. c. 71B §§ 1, 3 and 12.

30. The plaintiff class has demonstrated to a likelihood that the state defendants have failed to provide all handicapped children between the ages of three and twenty-one a free and appropriate public education in breach of their duties under federal and state law. 20 U.S.C. §§ 1412(1), (4) and (2)(B), and (6); M.G.L. c. 15 § 1M. *See also* 45 C.F.R. § 121a.600(c).

31. Specifically, while defendants have introduced evidence of their efforts to comply with the dictates of federal and state law, these efforts do not obviate the showing of likelihood of failure to fulfill statutory duties made by the plaintiff class, but rather may go to the issue of appropriate relief.

32. Balancing the hardship imposed by the issuance of a preliminary injunction against the hardship to be endured absent its issuance necessarily involves consideration of the scope of the injunction to be issued. Here, the ongoing irreparable harm to the plaintiff class involves the loss, perhaps forever, of special education services to which they are entitled. The hardship to be endured by defendants could involve expenditure of public funds in an unanticipated fashion, but nonetheless in a fashion which may be required by law as an original proposition. Moreover, given the circumstances of this case, a preliminary injunction incorporating all the preliminary relief plaintiff has sought possibly would involve only the cost of hiring qualified personnel to deliver services to inmates until projected grant programs are in place. In light of these considerations, the balance of hardships is in favor of the plaintiff class.

33. The public interest is served by the due and faithful fulfillment by public officials of the duties imposed upon them by law. Indeed, the plaintiff class has demonstrated that issuance of a preliminary injunction in this case would promote the fulfillment of the objectives established by the federal and state statutory schemes involved.

4. *See* 603 C.M.R. §§ 309.0 through 339.4

34. The plaintiff class has satisfied the four-prong standard applicable to the issuance of a preliminary injunction. This leaves the issue of the proper scope of relief to be afforded by the terms of the preliminary injunction.

D. Nature of Relief

35. To achieve delivery of special education services to inmates at the Hampshire and Franklin County Houses of Correction, it is essential that the Sheriffs of those facilities and their staffs cooperate with the state defendants.

36. Resolution of the underlying issue of state law, that is, upon whom the state legislature has placed responsibility for the delivery of special education services, must take place before a satisfactory accommodation of the interests of all the parties can be achieved.

37. The policies and procedures necessary for referral, evaluation and preparation of IEP's for inmates under twenty-two years of age, without high school diplomas, and entitled to a free and appropriate special education are in place and can be utilized by the Sheriffs and their staffs at the Hampshire and Franklin County Houses of Correction.[4] Regarding the actual delivery of special education services, the state defendants pursuant to their overall supervisory responsibility must provide these services until funding programs for Fiscal Year 1982 are in place.[5]

E. Preliminary Injunction

[8] 38. Therefore, a preliminary injunction will issue enjoining the state defendants from failing to provide special education services to the plaintiff class in accordance with the following terms:

A. That all inmates at the Franklin and Hampshire County Houses of Correction who are under twenty-two years of age and without high school diplo-

5. These services may be delivered directly or through contractual, licensing, or other arrangements.

mas be notified of their rights under M.G.L. c. 71B (Chapter 766).

B. That inmates at these facilities who are under twenty-two, without high school diplomas, and who so desire be referred, or continue to be referred, by the Sheriffs of these facilities to the school committee having jurisdiction over them for evaluation and possible preparation of IEP's. The state defendants shall assist the Sheriffs in this task generally, and shall take appropriate action to insure that local school committees carry out their obligations under Chapter 766 and Department of Education regulations.

C. That the state defendants provide forthwith, in cooperation with the Sheriffs of the Franklin and Hampshire County Houses of Correction, appropriate special education services to any inmate entitled to special education services in accordance with the terms of the inmate's IEP.

D. That the state defendants submit to this Court in thirty days a proposal for resolving the underlying state law issue under M.G.L. c. 127 § 48, that is, upon whom the legislature has placed initial or primary responsibility for the delivery of special education services to inmates at the County Houses of Correction.

E. That the state defendants complete as soon as possible the Request for Proposals for the Fiscal Year 1982 special/adult education grants and distribute it to the appropriate County Houses of Correction so that they may apply for the proposed grants.

F. That all the terms of this injunction be acted upon in a manner which gives due regard to the security needs of the correctional facilities involved, and to the extent possible, that the provision of services by the state defendants take place in the context of existing educational programs at the Hampshire and Franklin County Houses of Correction.

G. That the state defendants, the Sheriff of the Franklin House of Correction, and the Sheriff of the Hampshire House of Correction file reports within forty-five days with this Court and plaintiff's counsel relating the manner in which they have undertaken to fulfill the terms of this preliminary injunction, problems they have encountered, and proposals to remedy those problems. Said reports may include affidavits concerning the number of inmates involved; statements on the outlook for a long-range solution to the problem of delivering special education services to inmates at these facilities; and proposals for amendment or alteration of this preliminary injunction.

F. Dismissal of Sheriffs Ashe and Massimiano

39. F.R.Civ.P. 19(a)(1) provides for joinder of a party subject to service of process "if in his absence complete relief cannot be accorded among those already parties." The provisions of this rule have been liberally construed in this district and the First Circuit. *Harris v. White*, 479 F.Supp. 996 (D.Ma.1979), *Morgan v. Hennigan*, 379 F.Supp. 410 (D.Ma.) *aff'd* 509 F.2d 580 (1st Cir. 1974).

40. Because of the nature of the preliminary injunction to be entered in this case, it is clear that Sheriff John Boyle of the Hampshire County House of Correction and Sheriff Donald McQuade of the Franklin County House of Correction are necessary parties to accord complete relief in this action.

[9] 41. However, because the inmates at the Hampden and Berkshire Houses of Correction are receiving the services to which they are entitled and no controversy regarding those facilities remains before this Court, the presence of Sheriffs Ashe and Massimiano in this suit is no longer necessary and their motions to dismiss shall be allowed.

APPENDIX D

(Information provided by the Department of Correctional Education - Dr. Osa Coffey)

Chronology of Events

June 17, 1986 — age 15, was arrested in Hanover County on charges of breaking and entering and grand larceny and placed in Henrico detention home.

September 7, 1986 — Mr. was moved to the Hanover County Jail.

October 1, 1986 — Mr. was moved to Richmond City Jail.

November 3, 1986 — Mr. was sentenced to 40 years in the Penitentiary, with 20 years suspended.

February 25, 1987 — Mr. was transferred to the Southampton Reception and Classification Center.

March, 1987 — Mr. was under medical care for self-inflicted wounds.

April, 1987 — The Office for Civil Rights requested from the Department of Correctional Education information regarding the education program at Southampton. (This information was provided.) Within approximately the same timeframe, although it had been determined previously that Mr. qualified for Special Education Services, he refused those services.

July 14, 1987 — The OCR informed DCE that Mr. had indicated a willingness to participate in the educational program at Southampton. DCE then informed OCR that Mr. could be enrolled if he continued to cooperate. If he did not, DCE would seek from him a waiver which conformed to federal waiver requirements. The waiver was subsequently obtained due to his lack of cooperation.

August, 1987 — OCR investigated the provision of education services to Mr. while at Richmond City Jail. It was determined that he was in the GED program at the Richmond City Jail for three weeks but had voluntarily dropped from the program. The Virginia Department of Education responded at this point to OCR's inquiries. The VDOE responded that "the provision of an appropriate special education in the least restrictive environment under PL 94-142 was certainly not possible while Mr. was confined in the local jail."

September, 1987	Mr. was determined to no longer be in need of special education services.
December 1, 1987	Meeting of OCR, DCE and VDOE representatives met at the request of OCR to discuss the case. In this meeting the issues raised in the case were resolved to the satisfaction of the Office of Civil Rights. However, the greater issue was raised from this particular meeting: namely, who is responsible for providing special education services to inmates in the local jails within the Commonwealth.

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APPENDIX E

Cost of Providing Education Services
Virginia Model #1

Total Population in Virginia Jails	11,408[a]
Total Population Awaiting Trial	5,560[a]
Total Population Not Awaiting Trial	5,848[a]
Total State Responsible Inmates	2,894[a]
- under 22 years old	637[b]
Total Local Population Not Awaiting Trial	2,954[a]
- under 22 years old	650[b]

Total State Responsible eligible at 20% Handicap Rate	127[c]
Total State Responsible eligible at 50% Handicap Rate	319[c]
Total Local Inmates eligible at 20% Handicap Rate	130[c]
Total Local Inmates eligible at 50% Handicap Rate	325[c]

- Assuming 50% Handicap Rate and a 70% opt-in rate:[d]

Total eligible State Responsible Inmates (70% x 319)	223
Total eligible Local Inmates (70% x 325)	228

Average annual cost of service per inmate	$ 6,750[e]
Total Annual Cost/State Responsible Inmates	$1,505,250
Total Annual Cost/Local Inmates	$1,539,000

KEY

a. DOC August 8, 1989 "Tuesday Report"
b. DOC estimates 22% inmates in jail are under 22 years old (1/89 data)
c. Final report of the Institute on Mental Disability and the Law, The Prevalence of Mental Disabilities and Handicapping Conditions Among Juvenile Offenders (Ingo Keilitz Report).
d. 106 adults under 22 evaluated by DCE in 1987-88, 32 refused services
e. DCE cost - $6,704.00; DOE cost - $6,813.00

Source: Virginia State Crime Commission Staff Analysis

Cost of Providing Education Services
Virginia Model #2

Total Jail Population under 22 (1988)	2,368[b]
Handicapped Population under 22 (1988)	226[b]
% of Population under 22 with Handicap (1988)	9.5%
Estimated Jail Population under 22 (22% x 11,408[a])	2,509
Projected under 22 with Handicap (9.5% x 2,509)	238[c]
Approximately 50% of Population not Awaiting Trial (.50 x 238)	119
• Assume half to be State Responsible (.50 x 119)	60
• Assume half to be Local Inmates (.50 x 119)	60
Average Annual Cost per Inmate	$6,750
Total Annual Cost/State Responsible Inmates	$405,000
Total Annual Cost/Local Inmates	$405,000

KEY

a. DOC August 8, 1989 "Tuesday Report"
b. 83 of 95 jails reporting to Department of Correctional Education, January, '88, Department of Correctional Education Report on Educational Programs in Virginia Jails ("Dutton" Report)
c. Assumes 100% opt-in rate

Source: Virginia State Crime Commission Staff Analysis

Cost of Providing Education Services
Massachusetts Model

Total Population (14 Houses of Correction)	6,013[f]
Daily Average (1988-89) Receiving Special Education Services	96[g]
% of Total Population Receiving Services	1.6%
Virginia State Responsible Jail Inmates	2,894
Total Projected to use Services (1.6% x 2894)	46
Virginia Local Population Not Awaiting Trial	2,954
Total Projected to use Services (1.6% x 2954)	47
Average Annual Cost per Inmate	$6,750.00
Total Annual Cost/State Responsible Inmates	$310,500.00
Total Annual Cost/Local Inmates	$317,250.00

KEY

f. May, 1989 data
g. Massachusetts notifies all inmates under 22 without high school diploma of availability of special education services; allows opt-in.

Source: Virginia State Crime Commission Staff Analysis

APPENDIX F

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 2.1-701, 22.1-215 and 53.1-131 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 22.1-216.1, relating to special education for certain persons incarcerated in local jails.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-701, 22.1-215 and 53.1-131 of the Code of Virginia are amended and reenacted and the Code of Virginia is amended by adding a section numbered 22.1-216.1 as follows:

§ 2.1-701. (Effective July 1, 1990) Interagency Assistance Fund for Noneducational Placements of Handicapped Children.--A. There shall be established in the Department of Education, Department of Youth Services and Department of Social Services an Interagency Assistance Fund for Noneducational Placements of Handicapped Children. This Fund shall be for the purpose of providing payment of tuition, required related services and living expenses for handicapped children placed by the local social services or welfare agencies or the Department of Youth Services in private residential, special education facilities or across jurisdictional lines in (i) public schools while living in foster homes or child-caring facilities or (ii) private, special education day schools, if the individualized educational program indicates such school is the appropriate placement while living in foster homes or child-caring facilities.

This Fund shall also be for the purpose of providing payment of

the educational costs for handicapped children incarcerated in local jails who have requested special education and who have been identified as eligible to participate in special education programs conducted in local jails or who have been identified as eligible to participate and have been approved by the relavent divison superintendent for such participation in special education programs in public schools.

B. The portion of this Fund for foster-care handicapped children shall be administered by the Department of Social Services, which shall provide for such payments from local departments of welfare or social services using funds appropriated for such purpose. The portion of this Fund for children who are in custody of the Department of Youth Services shall be administered by that Department, which shall contribute the costs of maintaining such handicapped children. The Department of Education shall maintain and administer the portion of the Fund for the payment of direct instructional costs for such handicapped children. This part of the Fund shall be established as an allocation for special education in the appropriations act each year. The local school boards shall not be required to pay any costs for educating handicapped children who are placed by another public agency having custody, across jurisdictional lines or in a residential special education facility or for educating handicapped children who are incarcerated in local jails.

C. The Board of Education, Board of Youth Services and Board of Social Services shall jointly adopt such regulations as are necessary to implement this Fund.

§ 22.1-215. School divisions to provide special education; plan to be submitted to Board.--Each school division shall provide free and

appropriate education, including special education, for the handicapped children residing within its jurisdiction in accordance with regulations of the Board of Education.

For the purposes of this section, "handicapped children residing within its jurisdiction" shall include: (i) those individuals of school age identified as appropriate to be placed in public school programs, who are residing in a state institution operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services located within the school division, or (ii) those individuals of school age who are Virginia residents and are placed and living in a foster care home or child-caring institution or group home located within the school division and licensed under the provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 as result of being in the custody of a local department of social services or welfare or being privately placed, not solely for school purposes , or (iii) those individuals of school age who are incarcerated in local jails have requested special education and are eligible and approved to participate in public school special education programs .

The Board of Education shall promulgate regulations to identify (i) those children placed within facilities operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services who are eligible to be appropriately placed in public school programs ; and (ii) those handicapped children who are incarcerated in local jails, have requested special education and are eligible and approved to participate in special education programs in public schools. The regulations concerning handicapped children incarcerated in local jails shall not require any sheriff or any administrator of a local jail to perform any education services.

The cost of the education provided to children residing in the state institutions, who are appropriate to place within the public schools, shall remain the responsibility of the Department of Mental Health, Mental Retardation and Substance Abuse Services.

The cost of the education provided to children who are not residents of the Commonwealth and are placed and living in a foster care home or child-caring institution or group home located within the school division and licensed under the provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 shall be billed to the sending agency or person by the school division as provided in subsection C of § 22.1-5. No school division shall refuse to educate any such child or charge tuition to any such child.

Each school division shall submit annually to the Board of Education by such date as the Board shall specify a plan acceptable to the Board for such education for the year following and a report indicating the extent to which the plan required by law for the preceding year has been implemented.

§ 22.1-216.1. Duty to cooperate.--Every division superintendent shall cooperate with the office of the sheriff or the administrator of a local jail in facilitating a program of special education for handicapped children who are incarcerated in local jails, have requested special education and are eligible and approved to participate in such programs funded pursuant to § 2.1-701 of this Code.

§ 53.1-131. Provision for release of prisoner from confinement for employment, educational or other rehabilitative programs; escape; penalty; disposition of earnings.--A. Any court having jurisdiction for the trial of a person charged with a criminal offense or charged

with an offense under Chapter 5 (§ 20-61 et seq.) of Title 20 may, if the defendant is convicted and (i) sentenced to confinement in jail or (ii) being held in jail pending completion of a presentence report pursuant to § 19.2-299, and if it appears to the court that such offender is a suitable candidate for work release, assign the offender to a work release program under the supervision of a probation officer, the office of the sheriff or the administrator of a local or regional jail or a program designated by the court. The court further may authorize the offender to participate in educational or other rehabilitative programs designed to supplement his work release employment. The court shall be notified in writing by the director or administrator of the program to which the offender is assigned of the offender's place of employment and the location of any educational or rehabilitative program in which the offender participates.

Any person who (i) has been sentenced to confinement in jail ~~,~~ or (ii) has been sentenced as a felon and has six months or less to serve, in the discretion of the sheriff or the administrator of a local or regional jail, may be assigned by the sheriff or the administrator of a local or regional jail to a work release program under the supervision of the office of the sheriff or the administrator of a local or regional jail. The sheriff or the administrator of a local or regional jail may further authorize ~~the~~ such offender to participate in (i) educational or other rehabilitative programs as defined in this section designed to supplement his work release employment , or (ii) in the case of an eligible handicapped individual who has requested special education, after consultation with and pursuant to the approval of the division superintendent of schools, a special education program, established b

the local school division pursuant to Article 2 (§ 22.1-213 et seq.) of Chapter 13 of Title 22.1. The court which sentenced the offender shall be notified in writing by the sheriff or the administrator of a local or regional jail of any such assignment and of the offender's place of employment or other rehabilitative or educational program. The court, in its discretion, may thereafter revoke the authority for such an offender to participate in a work release, rehabilitative or educational program.

The sheriff or other administrative head of a local correctional facility and the Director may enter into an agreement to accept into the local work release program persons who are committed to the Department and who have met all work release standards. All persons accepted in accordance with this section shall be governed by all regulations applying to local work release, notwithstanding the provisions of any other section of the Code. Local jails shall qualify for compensation for cost of incarceration of such persons pursuant to § 53.1-20.1, less any payment for room and board collected from the inmate.

Any offender assigned to such a program by the court or sheriff or the administrator of a local or regional jail who, without proper authority or just cause, leaves the area to which he has been assigned to work or attend educational or other rehabilitative programs, or leaves the vehicle or route of travel involved in his going to or returning from such place, shall be guilty of a Class 2 misdemeanor. In the event such offender leaves the Commonwealth, the offender may be found guilty of an escape as provided in § 18.2-477. An offender who is found guilty of a Class 2 misdemeanor in accordance with this section shall be ineligible for further participation in a work

release program during his current term of confinement.

The Board shall prescribe regulations to govern the work release, educational and other rehabilitative programs authorized by this section.

Any wages earned pursuant to this section by an offender may, upon order of the court, be paid to the director or administrator of the program after standard payroll deductions required by law. Distribution of such wages shall be made for the following purposes:

1. To pay an amount to defray the cost of his keep;

2. To pay travel and other such expenses made necessary by his work release employment or participation in an educational or rehabilitative program;

3. To provide support and maintenance for his dependents or to make payments to the local department of welfare or social services or the Commissioner of Social Services, as appropriate, on behalf of dependents who are receiving public assistance as defined in § 63.1-87; or

4. To pay any fines, restitution or costs as ordered by the court.

Any balance at the end of his sentence shall be paid to the offender upon his release.

B. For the purposes of this section:

"Work release" means full-time employment or participation in suitable vocational training programs.

"Educational program" means a program of learning recognized by the State Council of Higher Education, the State Board of Education or the State Board of Corrections.

"Rehabilitative program" includes an alcohol and drug treatmen

program, mental health program, family counseling, community service or other community program approved by the court having jurisdiction over the offender.

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